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No. 86-

In The

Supreme Court of the United States

October Term, 1986

American Multi-Cinema, Inc.,
Petitioner,

v.

Syufy Enterprises,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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58 pp

QUESTIONS PRESENTED

Since passage of the Sherman Act in 1890 no distinction has been drawn between the burden to prove the formation of a Section 1 conspiracy and a Section 2 conspiracy. Proof that all co-conspirators had specific intent to monopolize has never been required to prove a Section 2 conspiracy.

Petitioner recovered judgment on a general jury verdict in the district court on three antitrust claims: (1) monopolization; (2) attempted monopolization; and (3) conspiracy to monopolize. The Ninth Circuit held there was substantial evidence to uphold the judgment on the monopolization and attempted monopolization claims. Apparently holding either that (a) the burden to prove the formation of a conspiracy to monopolize is higher than the burden to prove a conspiracy to restrain trade or (b) all co-conspirators in a conspiracy to monopolize must possess a specific intent to achieve a monopoly, the Ninth Circuit vacated the judgment. The Ninth Circuit refused to exercise appellate discretion to uphold the general verdict.

The questions presented by this petition are:

1. Is there a higher burden of proof to establish the formation of a conspiracy to monopolize than to establish a conspiracy in restraint of trade?

2. Where monopoly power is proven, is specific intent by each co-conspirator a necessary element in conspiracy to monopolize?

3. In a case with multiple claims for relief may a party who requests a general verdict raise for the first time on appeal the contention that there must be substantial evidence to uphold the verdict on all claims for relief?

4. Does the discretion to evaluate sufficiency of the evidence to uphold a general verdict lie with a district court subject only to limited appellate review for an abuse of discretion?

THE PARTIES

Petitioner American Multi-Cinema, Inc. (AMC) is a Missouri corporation. The parent company of AMC is AMC Entertainment Inc., a Delaware corporation. Respondent Syufy Enterprises (Syufy) is a California partnership.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner AMC requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 25, 1986, as amended on July 14, 1986, following a petition for rehearing.

OPINIONS BELOW

The amended opinion of the Court of Appeals is reported at 793 F.2d 990 (Appendix A). The opinion of the district court is reported at 555 F.Supp. 418 (Appendix B).

JURISDICTION

The amended judgment upon a petition for rehearing was filed July 14, 1986. AMC received an extension until November 11, 1986 to file its petition for writ of certiorari. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2 as set forth in Appendix C.

STATEMENT OF THE CASE

AMC and Syufy own and operate motion picture theatres that exhibit pictures in various metropolitan areas, including greater San Jose, California. In 1973 there was a need for additional theatres in the San Jose area, and in response thereto, AMC opened its 1500 seat Oakridge theatre [RT 2243-4]. At that time Syufy was the dominant indoor theatre chain in the San Jose area, and Syufy had a market share in excess of 90% [DX 8000-8023]. The Syufy theatres in the San Jose area included ten theatres referred to in the industry as "the domes."

Exhibitors license films from motion picture distributors. One of the terms included in a license agreement between an exhibitor and a distributor is clearance. Clearance is the geographic area surrounding a theatre within which all other exhibitors are precluded from exhibiting the licensed picture [RT 939]. Exhibitors have historically competed to license and exhibit films in geographic areas identified as zones [RT 3250]. Clearance over an entire zone is known as an exclusive run. The San Jose zone had a population in excess of one million [PX 208], included eight cities, and contained an area of more than 130 square miles. During the 1970's the San Jose zone was one of the fastest growing metropolitan areas in the United States [RT 2028] and became one of the four largest markets, based upon box office receipts, in the country [RT 1106].

The San Jose zone was the relevant geographic market [Appendix B-10]. The major pictures [1] comprised the relevant product market [Appendix A-5-7; RT 2767, 2772-3].

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[1] The major pictures are characterized by: famous stars, directors and producers; large production costs and advertising budgets; release by the major distributors; greater film rental; and nationwide audience appeal [RT 2407, 2636-8, 2644; DX 8053-1].

Syufy's market share averaged 70% for the four years prior to the filing of AMC's counterclaim [DX 8000-8023].

Prior to 1970 the major pictures were licensed to only one theatre in a zone. This business practice was known as exclusive run. In the early 1970's the substantial investment required to produce and distribute the major pictures caused the distributors to increase the number of theatres to which they would simultaneously exhibit a picture in a zone [RT 3234-6]. This form of exhibition, known as multiple run, or day-and-date, both enabled distributors to receive more film rental from exhibitors and recoup their investment more rapidly than under the inefficient exclusive run [RT 3238]. By 1975 multiple run was utilized by distributors in all zones other than San Jose [RT 2022-4].

The San Jose zone was the only market in the United States where the distributors did not license the major pictures on a multiple run basis. Raymond McCafferty, senior vice-president in charge of film distribution for Twentieth Century-Fox Film Corporation [RT 2394], a position he formerly held with Columbia Pictures Industries, Inc. [RT 2395], explained the reasons that distributors abandoned exclusive run licensing. McCafferty testified that multiple run was in the best economic interest of the distributors, since more film rental resulted and the film rental was received earlier than through exclusive run. McCafferty stated that multiple run resulted in advertising cost savings to distributors. Revenue in the after-markets of television, cable and cassette was enhanced because the films reached these markets earlier [RT 2405]. McCafferty stated: "We are almost without exception unalterably opposed to exclusive runs." [RT 2494]. "We do not believe that the exclusive run is the proper run." [RT 2494]. "[Motion picture exhibitors] have found that they really are not hurt by playing with the theatre in the next shopping area." [RT 2505]. "I would love to exhibit my product in San Jose on a multiple run basis as we do in so many towns like San Jose around the country." [RT 2404-5]. Maximization of film rental should be the objective

of distributors [RT 1469, 2401, 2749]. In the San Jose zone the distributors did not maximize film rental because they licensed the major pictures on an exclusive run basis [RT 549-50].

In mid-1975 AMC opened its six auditorium 1,800 seat Saratoga theatre in the San Jose zone. Both AMC's Oakridge and Saratoga theatres utilized state-of-the-art interlock projection equipment which could show the same picture in more than one auditorium at each theatre [RT 2267-8]. AMC offered to show the major pictures in at least two auditoriums at both the Oakridge and Saratoga theatres, in contrast to Syufy, which could only exhibit a major picture in one of its domes. Larger seating capacity at the Oakridge and Saratoga theatres enabled AMC to pay the distributors more film rental than any Syufy theatre [RT 2756]. AMC's Oakridge and Saratoga theatres offered the distributors a superior alternative to the obsolete Syufy domes [RT 156, 2365, 2756, 3002]. Despite the disappearance of exclusive runs in all other zones in the United States, monopolist Syufy coerced the distributors to act against their best economic interests for the purpose of maintaining Syufy's monopoly in the San Jose zone.

The Syufy domes always demanded and received clearance from distributors over all other theatres in the San Jose zone.[2] As a result of Syufy's clearance practice AMC's Oakridge and Saratoga theatres, which were not in competition with the domes, were precluded from day-and-date exhibition of the major pictures [RT 631-2, 2747-8, 2758-64, 2787, 2789]. The distributors and Syufy thus eliminated AMC's ability to exhibit the major pictures [RT 1768, 3105, 3390].

Syufy refused to exhibit pictures in the domes unless the distributors agreed to give Syufy clearance over all other

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[2] This clearance resulted in Syufy having an exclusive run. The terms clearance and exclusive run when applied to Syufy's licensing practices were used interchangeably by the witnesses because Syufy's clearance practices always resulted in an exclusive run.

theatres in the San Jose zone [RT 953-4, 2728-A]. This clearance policy was rigidly adhered to without consideration of relevant factors on a picture-by-picture basis in an area of significant population growth [RT 998, 1025-6]. This unreasonable clearance resulted in only one theatre being available for more than one million moviegoers [RT 953-4] and had as its purpose the elimination of AMC and other exhibitors from the market [RT 952].

Syufy's policy had an anticompetitive effect since it prevented other exhibitors from showing a picture on a day-and-date basis with Syufy [Appendix A-10; RT 2787]. Distributors assisted in the perpetuation of Syufy's monopoly by granting Syufy's requests for unreasonable clearance. Syufy's owner explained the distributors' role by stating that distributor acceptance of bids containing unreasonable clearance made the distributor "a party to an unreasonable clearance." [RT 1386].

The San Jose zone was the only major market in the United States in which rigid adherence to the outdated and uneconomic practice of exclusive run exhibition occurred [RT 549-50, 2115, 2241, 2247, 2399, 2475, 2839-40, 3269]. This exclusionary practice resulted in the major distributors eliminating all meaningful competitors to Syufy [RT 2647-8]. The distributors' practice also limited the number of new entrants into the San Jose zone [Appendix A-8, B-10; RT 3270-1]. Jack Myhill, former head film buyer for Pacific Theatres, Inc., complained to all distributors about anticompetitive agreements between Syufy and the major distributors which adversely affected competition among exhibitors [RT 929-32; DX 3139-3163]. There were no characteristics of the San Jose zone which justified the exclusive run pattern and practice [RT 2654]. The Syufy motive was to prevent competition in the San Jose zone since Syufy claimed that the "domes couldn't survive playing with anyone else in the marketplace; and . . . they weren't going to allow it." [RT 2907].

Syufy also possessed monopoly power in the drive-in theatres in the San Jose zone since it owned 100% of the drive-ins. There was no reason for Syufy to bid for a drive-in run because Syufy owned all the drive-in theatres [RT 920-1, 941-2, 1050, 2562, 2579, 2643-4]. Syufy, nevertheless, regularly submitted bids to license the major pictures at its drive-ins, which, when accepted, limited the distributors' ability to license the picture at more than one indoor theatre in the San Jose zone [RT 3096-7]. These conditioned bids required the distributor to only license its picture in one indoor theatre in the San Jose zone. When a distributor accepted a conditioned drive-in bid, it was precluded from licensing a multiple run of the same picture at indoor theatres in the San Jose zone [RT 2425-6, 2582]. Coupled with Syufy's exclusive-only policy, the conditioned bids resulted in Syufy exhibiting almost all major pictures in the San Jose zone. Syufy admitted that it did not use these conditioned bids in any market other than San Jose [RT 2582-4]. The distributors acquiesced in this practice for to do otherwise would jeopardize their ability to license the major pictures in any drive-in. The drive-in market was important to all distributors [RT 2407, 2562, 2794-5].

At the conclusion of AMC's evidence Syufy made no motion for a directed verdict. At the conclusion of all evidence Syufy's motion for a directed verdict did not claim that AMC had failed to prove the distributors' awareness of Syufy's unlawful intent or the distributors' specific intent to monopolize the relevant market. Syufy requested a general form of verdict and did not request special forms of verdict on each of AMC's claims. The jury returned a verdict in favor of AMC on its monopolization, attempt to monopolize and conspiracy to monopolize claims. The district court held there was substantial evidence to support all of AMC's claims, and denied Syufy's motions for judgment notwithstanding the verdict or new trial [Appendix B-13]. The Ninth Circuit affirmed the judgment in favor of AMC on its

monopolization [3] and attempt to monopolize claims [Appendix A-10, 16], but held the district court erred in denying Syufy's motion for judgment notwithstanding the verdict on the conspiracy to monopolize claim. The reason the Ninth Circuit reversed the judgment on the conspiracy to monopolize claim in favor of AMC is not clear. The court apparently concluded either that AMC failed to prove the distributors' awareness of Syufy's unlawful intent or failed to prove the distributors' specific intent to monopolize [Appendix A-18].

REASONS FOR GRANTING THE WRIT

I.
CONTRARY TO *PARAMOUNT, ALBRECHT* AND *SCHINE*, THE NINTH CIRCUIT DIFFERENTIATED BETWEEN THE BURDEN OF PROOF NECESSARY TO ESTABLISH A SECTION 1 CONSPIRACY AND A SECTION 2 CONSPIRACY

This court has always held that the burden of proof in establishing the formation of a Section 1 conspiracy is satisfied by proving co-conspirator acquiescence to unlawful conduct. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948). No distinction has ever been drawn between the Section 1 burden of proof and the burden of proof necessary to establish formation of a Section 2 conspiracy. Congress never drew this distinction. The Ninth Circuit, however, distinguished between a Section 1 and a Section 2 conspiracy by adding an additional element to the burden of proof in a Section 2 conspiracy—proof that co-conspirators (distributors) possessed knowledge of Syufy's monopolistic

[3] The Ninth Circuit in its amended opinion [Appendix A-23] recognized that AMC prevailed on one of two monopolization theories. Prevailing on one theory alone was sufficient to sustain the monopolization claim. *See Baumler v. State Farm Mutual Automobile Insurance Company*, 493 F.2d 130, 134 (9th Cir. 1974) ("[W]here there are two alternative factual theories which might support the verdict, the verdict will be upheld if there is sufficient evidence to support either theory.")

intent. The Ninth Circuit's holding is directly contrary to *Paramount*.

In *Paramount* the court explained that motion picture distributors' "acquiescence" with exhibitors proved the formation of a conspiracy to monopolize. *Id.* at 161. The *Paramount* court did not, as the Ninth Circuit has, require proof that the distributors "knew or even should have known that Syufy would use the film licenses for monopolistic purposes." [Appendix A-18]. In *Paramount* the court defined the quantum of proof required to establish the formation of a Section 2 conspiracy:

> There is some suggestion on this [Section 1] as well as on other phases of the cases [Section 2] that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. *For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.*

Id. at 161. (Emphasis added)

Thus, this court in *Paramount* held that the government proved a conspiracy to monopolize by demonstrating distributor acquiescence to exhibitor requests for unreasonable clearance. AMC satisfied the burden of proof imposed by *Paramount*—distributor acquiescence to Syufy's unreasonable clearance requests. [4] The Ninth Circuit ignored *Paramount* by requiring that AMC prove the distributors' knowledge of Syufy's unlawful intent.

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[4] AMC also satisfied the erroneous burden of proof required by the Ninth Circuit. AMC established distributor "awareness" of Syufy's unlawful intent when it proved that distributors accepted Syufy's bids containing unlawful clearance. The Ninth Circuit ignored this evidence. AMC was entitled to all reasonable inferences from the evidence.

A logically similar issue was addressed in *Albrecht v. The Herald Company*, 390 U.S. 145 (1968) wherein this court stated:

> The combination with retailers arose because their *acquiescence* in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they *cooperated* in terminating price-cutting retailers.

Id. at 149. (Emphasis added) *See also Simpson v. Union Oil Company of California*, 377 U.S. 13, 17 (1969). The *Albrecht* court did not require proof that the cooperating retailers knew of the wholesalers' unlawful purpose. *Albrecht* exposes the Ninth Circuit's erroneous reasoning. Under *Albrecht* AMC would not have been required to prove that the distributors knew of Syufy's unlawful purpose or intent. The Ninth Circuit failed to apply *Albrecht*.

The Ninth Circuit stated that it knew of "no authority" that a Section 2 conspiracy could be established without proving knowledge of monopolistic intent by more than one of the co-conspirators [Appendix A-18]. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948) and *Paramount* provide this authority. The Schine defendants' negotiations with distributors resulted in the execution of film license agreements between distributors and exhibitors. Mere execution of these agreements "brought the distributors into unlawful combinations with the Schine defendants." *Id.* at 116. The court did not require the government to prove that the distributors knew of the Schine defendants' unlawful intent. The only requirement to establish formation of the conspiracy was proof that the distributors signed film license agreements.

In *Paramount* the court found that contractual provisions which granted competitive advantages to exhibitors constituted proof of a conspiracy between an exhibitor and a distributor. "Each discriminatory contract constituted a conspiracy between licensor and licensee." *Id.* at 160. AMC proved that Syufy's monopoly power resulted from film license agreements executed by distributors. By proving that the distributors signed the film license agreements which contained unlawful clearances, AMC satisfied the burden of proof established by *Schine* and *Paramount*. The Ninth Circuit rejected the *Schine* and *Paramount* standards.[5] This court should grant certiorari to correct the failure to apply *Schine* and *Paramount* and to correct the Ninth Circuit's misinterpretation of the Sherman Act.

II.
THE NINTH CIRCUIT'S OPINION REQUIRING PROOF OF CO-CONSPIRATOR SPECIFIC INTENT DIRECTLY CONFLICTS WITH *GRIFFITH* AND *PARAMOUNT*

This court held in *United States v. Griffith*, 334 U.S. 100, 105 (1948) that it is not "necessary to find a specific intent to restrain trade or to build a monopoly" to prove a conspiracy to monopolize. Similarly, in *Paramount* this court explained that in a conspiracy to monopolize action:

> '[S]pecific intent' is not necessary to establish a 'purpose or intent' to create a monopoly but that the requisite 'purpose or intent' is present if monopoly results as a necessary consequence of what was done.

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[5] The Ninth Circuit described AMC's conspiracy evidence as "murky" because AMC failed "to specify" whether it claimed a "single grand conspiracy involving all the major distributors and Syufy" or "six separate conspiracies, each one involving a single distributor and Syufy." [Appendix A-17-8]. Under *Paramount* and *Schine* each film license agreement between Syufy and a distributor proved a conspiracy. Syufy confirmed the *Paramount* holding when its owner admitted that distributor acceptance of a bid containing an unreasonable clearance made the distributor "a party to an unreasonable clearance." [RT 1386].

Id. at 173. Despite this court's clear holdings in *Griffith* and *Paramount*, the Ninth Circuit vacated a jury verdict and judgment in favor of AMC in excess of three million dollars because it erroneously concluded that AMC did not prove a co-conspirator's specific intent.

The Ninth Circuit held there was substantial evidence to support AMC's monopolization and attempt to monopolize claims against Syufy. In reviewing the conspiracy to monopolize claim, the Ninth Circuit held that AMC had the burden to prove that the motion picture distributors purposefully granted clearance with intent that Syufy would achieve monopoly power [Appendix A-18].[6] Based upon AMC's failure to prove this newly invented element of a conspiracy to monopolize claim, the Ninth Circuit vacated the judgment in favor of AMC. This burden of proof was not advocated by Syufy at trial nor on appeal.

The Ninth Circuit's opinion ignored forty years of Supreme Court motion picture and other antitrust authority and again placed the Ninth Circuit in direct conflict with this court. The opinion conflicts with this court's decisions in *Griffith; Paramount; American Tobacco Company v. United States*, 328 U.S. 781, 814 (1946); *United States v. United States Gypsum Company*, 438 U.S. 422, 436 n.13 (1978); *United States v. Masonite Corporation*, 316 U.S. 265, 275 (1942); *Anderson v. Shipowners Association of the Pacific Coast*, 272 U.S. 359, 363 (1926); *Nash v. United States*, 229 U.S. 373, 376 (1913); *United States v. Patten*, 226 U.S. 525, 543 (1913); and *Northern Securities Company v. United States*, 193 U.S. 197, 328-30 (1903). These cases all hold that if conspirators' actions have resulted in a violation of the Sherman Act, it is irrelevant whether specific intent is proven. The only intent which a civil antitrust plaintiff must prove is the conspirators' general intent (the

[6] The Ninth Circuit interchangeably described this element as "specific intent", "common purpose", "distributor awareness" and distributor knowledge of anticompetitive conduct [Appendix A-18].

intent to do the act) as opposed to specific intent (the intent to accomplish a certain objective).

Analysis of every Supreme Court opinion defining the elements of a conspiracy to monopolize claim reveals specific intent is not an element when a monopoly has resulted from conspirators' actions. The government in *Griffith* instituted an antitrust action against exhibitors and the same major motion picture distributors that conspired with Syufy, alleging the exhibitors and distributors monopolized and had conspired to monopolize the market. *Id.* at 103. The district court dismissed the conspiracy to monopolize claim since the government had not demonstrated the conspirators acted with a "purpose to monopolize." *Id.* at 104-5. This court reversed and held:

> *It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated.* It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. (Citations omitted) To require a greater showing would cripple the Act.

Id. at 105. (Emphasis added)

The *Griffith* court re-emphasized this principle when it explained:

> And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.
>
> * * *
>
> Monopoly rights in the form of certain exclusive privileges were bargained for and obtained. These exclusive privileges, being acquired by the use of monopoly power, were unlawfully acquired. *The appellees, having combined with each other and with the distributors to obtain those monopoly rights, formed a conspiracy in violation of §§ 1 and 2 of the Act.*

Id. at 108-9. (Emphasis added)

The Ninth Circuit's analysis in this case is indistinguishable from the district court's erroneous reasoning in *Griffith*. The Ninth Circuit found that despite the distributors granting unreasonable clearance to Syufy, the distributors did not have a common purpose with Syufy to monopolize [Appendix A-18-9]. In *Griffith* this court held that distributors are "chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what [they] did." *Id.* at 108. Syufy's monopoly power was a necessary and direct consequence of the distributors granting unreasonable clearance to Syufy. Both the Ninth Circuit and the district court found Syufy's monopoly power directly resulted from Syufy's unlawful agreements with the distributors. Syufy's combination with the distributors to obtain excessive clearances established a conspiracy with the distributors in violation of Section 2 of the Act.

This court in *Paramount* examined the necessity of proving specific intent in a conspiracy to monopolize action. The government instituted an antitrust action against the major motion picture distributors (again, the same major motion picture distributors that conspired with Syufy) for violations of Sections 1 and 2 of the Sherman Act. The district court dismissed the conspiracy to monopolize count because there was an "absence of 'purpose' on the part of any of the five majors to achieve a 'national monopoly' in the exhibition of motion pictures." *Id.* at 172. This court, in remanding the case to the district court for reconsideration of the conspiracy to monopolize claim, reiterated the principle announced in *Griffith:*

> '[S]pecific intent' is not necessary to establish a 'purpose or intent' to create a monopoly but that the requisite 'purpose or intent' is present if monopoly results as a necessary consequence of what was done.

Id. at 172-3.

The *Paramount* court held it was only necessary that the motion picture distributors "join" with the exhibitors to prove a conspiracy to monopolize. The court did not, as the Ninth Circuit has, require proof of specific intent:

> *It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice.* See United States v. Crescent Amusement Co. supra (323 US p 183, 89 L ed 168, 65 S Ct 254).

Id. at 155. (Emphasis added)

Not only has this court in motion picture antitrust conspiracy to monopolize cases held that proof of specific intent is not necessary, it has consistently applied the same principle in all other conspiracy to monopolize cases when one of the conspirators has achieved a monopoly. In the leading conspiracy to monopolize case, *American Tobacco Co.*, this court reviewed the element of specific intent in a Section 2 Sherman Act conspiracy: "To read the passage as demanding any 'specific' intent, makes nonsense of it. . . ." *Id.* at 814. [7] The Ninth Circuit's opinion demanding proof of specific intent makes nonsense of the Act.

In the almost one hundred years of jurisprudence interpreting the Sherman Act, no court has ever required proof of specific intent in a conspiracy to monopolize case when the conspiracy resulted in a monopoly. The Ninth Circuit's creation of this element ignored every Supreme Court case that addressed the issue. Requiring an antitrust plaintiff to prove specific intent cripples the Act and threatens "the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers,*

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[7] *See also Nash* where the court refused to impose a specific intent element because there was "no reason for reading into the Sherman Act more than we find there, we think it unnecessary to offer arguments against doing so." *Id.* at 376. Nowhere does Section 2 of the Sherman Act require specific intent.

Inc. v. International Parts Corp., 392 U.S. 134, 136 (1968). AMC's petition for writ of certiorari must be granted to resolve the Ninth Circuit's departure from this court's clear precedent and to provide direction to the district courts regarding correct interpretation of the Sherman Act. [8] Without proper instruction to the district courts, the additional burden imposed by the Ninth Circuit may soon vitiate Section 2 of its vitality.

III.
THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS REGARDING THE EVALUATION OF GENERAL VERDICTS

The general verdict and judgment in favor of AMC were based upon three claims. [9] The Ninth Circuit held that there was substantial evidence to uphold the judgment on two of the three claims. Holding that AMC was required to sustain the judgment on all claims, the Ninth Circuit's opinion con-

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[8] The Ninth Circuit's unprecedented requirement also conflicts with the Seventh Circuit's decision in *United States v. National City Lines*, 186 F.2d 562, 571 (7th Cir. 1951), the Eighth Circuit's decision in *Kansas City Star Company v. United States*, 240 F.2d 643, 658 (8th Cir. 1957), *cert. denied*, 354 U.S. 923, the Second Circuit's decision in *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-9 (2d Cir. 1945), and other Ninth Circuit decisions, including *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 218-9 (9th Cir. 1964). Certiorari also should be granted to resolve a dispute between the circuits, and separate panels of the Ninth Circuit itself.

[9] The Ninth Circuit's original opinion reported at 783 F.2d 878 failed to distinguish between AMC's "claims" and "theories" and held there was an insufficiency of evidence on two of AMC's four "claims." The amended opinion recognized that AMC only asserted three claims: (1) monopolization; (2) attempted monopolization; and (3) conspiracy to monopolize. The Ninth Circuit found substantial evidence in support of AMC's monopolization and attempted monopolization claims. Thus, the only issue before this court is the Ninth Circuit's erroneous determination that there was not sufficient evidence to support one of the elements of AMC's conspiracy to monopolize claim. Reversal of the Ninth Circuit's misinterpretation of this court's decisions requires affirmation of the district court's judgment.

flicts with the holding of the Seventh Circuit in *McGrath v. Zenith Radio Corporation*, 651 F.2d 458, 464 (7th Cir. 1981), *cert. denied*, 454 U.S. 835. In that case, the court held that a general verdict in favor of plaintiff predicated upon three claims of liability could be reversed on appeal only if defendants established that under none of the three claims was plaintiff entitled to recover. *Id.* at 464. The holding in *McGrath* stands in direct conflict with this case. In order to provide uniformity among the circuits, this court should grant AMC's petition for writ of certiorari to resolve this conflict.

IV.
DISTRICT COURTS, NOT CIRCUIT COURTS, ARE VESTED WITH DISCRETION TO REVIEW GENERAL VERDICTS

Syufy requested a general verdict, not special forms of verdict on each of AMC's claims.[10] The district court determined there was substantial evidence to uphold the judgment in AMC's favor on all three claims [Appendix B-14]. The Ninth Circuit, nevertheless, held that it would not exercise its "discretion" to attribute the general verdict to AMC theories properly submitted to the jury [Appendix A-21]. Instead of remanding the case to the district court for a discretionary review under the principles of *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980), the Ninth Circuit determined that it had *de novo* discretionary power.

The function of a circuit court is to determine if the district court abused its discretionary power. *Cf. National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). District courts are in the best position to evaluate witness credibility, weight of evidence and potential for jury confusion when multiple claims are present. This court should grant AMC's petition for writ of certiorari, hold

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[10] A party who makes no request for a special verdict cannot assert the issue for the first time on appeal. *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839, 845 (4th Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).

that district courts, not circuit courts, in the first instance are vested with discretion to review general verdicts and remand the case to the district court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the amended judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: November 11, 1986

Appendix A

Appendix A

Syufy Enterprises,
Plaintiff-Appellant/Cross-Appellee,

v.

American Multicinema, Inc.,
AMC Film Management Inc., and Durwood, Inc.,
Defendants-Appellees/Cross-Appellants.

Nos. 83-2725, 84-1728.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 13, 1984.

Decided Feb. 25, 1986.

As Amended on Denial of Rehearing and
Rehearing En Banc July 14, 1986.

Before CANBY and NORRIS, Circuit Judges, and STEPHENS,* Senior District Judge.

NORRIS, Circuit Judge:

In this antitrust case involving the exhibition of major feature films in the San Jose area, a jury returned a general verdict in favor of appellees American Multicinema, Inc. (AMC)[1] on its counterclaim against appellant, Syufy Enterprises. The jury awarded AMC damages totaling $1,006,421. Judgment was entered for that amount trebled and for attorney's fees.[2]

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* The Honorable Albert Lee Stephens Jr., Senior United States District Judge for the Central District of California, sitting by designation.

[1] AMC's corporate structure includes three related entities. AMC owns and operates the exhibition screens; AMC Film Management, Inc. acts as a film buying and booking agent for AMC theatres; and Durwood, Inc. owns a controlling interest in both AMC and AMC Film Management.

[2] The jury also found in favor of AMC on the antitrust claims raised by Syufy in its complaint. Syufy does not appeal that part of the verdict. In addition, the district court granted a directed verdict in favor of Syufy

The case went to the jury on AMC's claims that Syufy monopolized, attempted to monopolize and conspired to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). Syufy's principal arguments on appeal relate to the sufficiency of the evidence to support the general verdict in favor of AMC.[3] Syufy also challenges the admission of certain evidence.

Syufy contends that the district court erred in failing to grant a judgment *non obstante veredicto*. The standard for determining the propriety of a judgment n.o.v. is the same for district and appellate courts. *California Computer Products v. International Business Machines, Inc.*, 613 F.2d 727, 734 (9th Cir. 1979). It is also the same as the standard for determining the propriety of a directed verdict: whether, "viewing the evidence as a whole, there is substantial evidence present that could support a finding . . . for the nonmoving party." *Id.* (quoting *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Washington v. United States*, 214 F.2d 33, 41 (9th Cir.), *cert. denied*, 348 U.S. 862, 75 S.Ct. 86, 99 L.Ed. 679 (1954).

Four distinct theories of Section 2 violations by Syufy were submitted to the jury. We hold that the evidence was sufficient to support a jury finding that Syufy violated Section 2 with respect to two of the theories: that Syufy monopolized and attempted to monopolize the San Jose hardtop major film exhibition market. We further hold that the evidence was inadequate to support a verdict for AMC with respect to the remaining two theories: that Syufy violated Section 2 by leveraging its monopoly power in the San Jose drive-in theater market and that Syufy conspired to monopolize the major film hard-top exhibition market. Finally,

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on AMC's claim that Syufy conspired to restrain trade in violation of Section 1 of the Sherman Act.

[3] Syufy does not contest the jury instructions on appeal.

we reject Syufy's arguments that the district court erred in admitting certain evidence.[4]

Part I of our opinion addresses AMC's theory that Syufy monopolized the hardtop market. Part II considers AMC's theory that Syufy leveraged its monopoly power in the drive-in market to gain a competitive advantage in the hardtop market. Parts III and IV evaluate the attempt to monopolize and conspiracy to monopolize theories. In Part V, we consider whether the general verdict may be affirmed as attributable to one of AMC's two viable theories. Part VI responds to Syufy's claim that the trial court erred by admitting evidence concerning Syufy's acquisition of the Mann Theater. In Part VII we address Syufy's contention that AMC's damage estimates were flawed.

I. THE THEORY THAT SYUFY MONOPOLIZED THE MAJOR FILM HARDTOP EXHIBITION MARKET

AMC's monopolization claim stems from Syufy's extensive ownership of both drive-in and hardtop movie theaters in the San Jose area. During the relevant period, Syufy owned all four drive-in theater complexes in the San Jose market. Syufy also operated a total of fifteen screens in large domed hardtop theaters, each with a seating capacity of 680-900 people. Syufy's domed hardtop theaters were known as "event" theaters because of their wide screens, state of the art sound, high ceilings and rocking chair seats.

During the same period, AMC owned and operated four theater complexes in the San Jose area. Each complex housed six auditoriums with seating capacities of approximately 250 people. AMC's theaters were generally located within shopping malls and lacked many of the amenities found in Syufy's hardtop theaters.

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[4] Syufy also argues that in setting the rate of interest on the judgment, the district court erred in applying retroactively both California (Cal.Civ.Proc.Code § 685.010 (West Supp.1986)) and federal (28 U.S.C. § 1961 (1982) statutes enacted after the date of judgment. We need not reach this issue because we vacate the district court's judgment and remand for a new trial. Clearly, any judgment entered subsequent to this opinion will be governed entirely by 28 U.S.C. § 1961.

But AMC's theaters were conveniently located and offered greater selection of movies than Syufy's theaters. They also charged, on average, a lower admission price.

AMC claims that Suyfy used its dominant position in the ownership of both hardtop and drive-in theaters to monopolize the exhibition of major films in the San Jose area. AMC advanced two discrete theories in support of this claim. AMC's first monopolization theory is that Syufy effectively deprived AMC of any chance to compete for major motion pictures in the San Jose area by using its dominant position in the market to license such pictures on an exclusive basis.

To establish monopolization under Section 2 of the Sherman Act, "a plaintiff must prove: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal 'antitrust' injury." *Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 698 F.2d 1377, 1382 (9th Cir.), *cert denied*, 464 U.S. 955, 104 S.Ct. 370, 78 L.Ed.2d 329 (1983); *see also California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 735 (9th Cir. 1979). Thus, we must decide whether AMC presented substantial evidence with respect to each of the three elements of a monopolization claim.

A. Monopoly power.

Monopoly power—the first element of monopolization—is the power to control prices or exclude competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). We begin our analysis of the issue of market power with a discussion of market definition and then turn to the question whether there is substantial evidence that Syufy had monopoly power within the relevant market.[5]

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[5] We utilize this simplified structural approach—rigidly bifurcating market definition from the question of power within the defined market. *see generally* L. Sullivan, *Handbook of the Law of Antitrust* 33-35 (1977),—because it has been adopted by the parties. We do not imply that this is the exclusive way to approach the question of market power.

1. Market definition.

We begin by considering the definition of the relevant market within which Syufy allegedly possessed monopoly power. *See United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945) (*"Alcoa"*). Relevant market is a factual issue which is decided by the jury; the court is not permitted to account for witness credibility, weigh the evidence, or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984).

AMC defined the relevant market as the market for exhibition of industry anticipated top-grossing motion pictures in the San Jose area. Syufy does not dispute the geographic component of this definition—the San Jose area. Nor does it dispute limiting the product market definition to hardtop theaters. The only aspect of AMC's market definition that Syufy disputes is the limitation of the relevant product market to the exhibition of major films, more specifically to industry-anticipated top-grossing films. Syufy argues that this market definition is ex post facto and ad hoc, and that all first run films are in substantial competition with each other.

In evaluating Syufy's challenge, we begin with the principle that assessment of a product market definition must take into account whether products excluded from the definition are "interchangeab[le] in use" with those included in the market and whether there is "cross-elasticity of demand" between excluded and included products. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394-95, 76 S.Ct. 994, 1006-07, 100 L.Ed. 1264 (1956). In economic terms, we might recharacterize Syufy's argument as follows: all first run films are interchangeable in use and the price and availability of any one film will affect the demand for all other films. Top-grossing films, Syufy argues, are simply those films that prove to be highly successful in the market place, but they possess no special characteristics that differentiate them from less successful films from an ex ante perspective. Syufy also argues that limiting the product definition to top-

grossing films has the effect of irrationally and unfairly penalizing the exhibitor with the prescience to book films that later prove to be big hits with the movie-going public.

AMC's rejoinder is that Syufy's argument mischaracterizes the product market definition. AMC points out that it did not define the market as simply top-grossing films, but as *industry anticipated* top-grossing films. AMC argues that these films can be differentiated from other first run films from an ex ante perspective because they have larger budgets, "name" stars and directors, larger advertising budgets, command large guarantees, and possess other distinctive characteristics which can be identified before the film is released. In economic terms, the viability of AMC's product market definition depends on the proposition that anticipated top-grossing films are not interchangeable with other films in the eyes of consumers and that price increases or supply constrictions for such films do not result in a shift in consumption patterns to other films. In legal terms, the question is whether the films excluded from the definition are "interchangeab[le] in use" with those included in the market and whether there is "cross-elasticity of demand" between excluded and included products. *United States v. E.I. duPont de Nemours & Co.*, 315 U.S. 377, 394-95, 76 S.Ct. 994, 1006-07, 100 L.Ed. 1264 (1956). In more colloquial terms, the viability of the proposed definition depends on the argument that if the price for admission to *E.T.* goes up, audiences will not flock to *My Dinner with Andre*.

We conclude that there is sufficient evidence in the record to permit a rational jury to conclude that industry anticipated top-grossing films constitute a distinct product market. The evidence indicates that approximately thirty pictures a year are identifiable as "anticipated top grossing films" on the basis of such criteria as national advertising support, longer playtimes, guaranteed rentals, famous stars, directors and producers, booking in first class theatres, and lucrative terms offered for the pictures by exhibitors. AMC compiled a list of the industry anticipated top-grossing films based on bidding materials submitted by both Syufy and AMC. Although AMC did not present direct evidence going to the "cross-elasticity of demand" between this limited class of pictures and other films, the jury could reasonably have concluded

from the evidence presented that the industry anticipated top-grossing films were not in substantial competition with other films.

2. Monopoly power within the relevant market.

Syufy contends that even if AMC's market definition is valid, AMC failed to prove that Syufy possessed monopoly power within that market. Syufy argues that the only evidence probative of its market power is that it had a 60-69% share of the market, which Syufy claims is insufficient, standing alone, to establish that it had monopoly power. Under existing antitrust case law, the question whether a 60-69% market share is sufficient, standing alone, to support a finding of monopoly power is a perplexing one. Ever since Judge Learned Hand laid down his rule of thumb in the *Alcoa* case that a ninety percent market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not," *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir.1945), courts have struggled with the question of the minimum market share necessary to establish monopoly power. In *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), the Supreme Court, acknowledging that "[t]he existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market" (*id.* at 571), held that a market share of 87% could sustain a finding of monopoly power. But as far as we know, neither the Supreme Court nor any other court has ever decided whether a market share as low as 60-69% is sufficient, standing alone, to sustain such a finding.

AMC argues that we need not decide that abstract question because the record contains evidence other than Syufy's market share that is probative of Syufy's power to control prices or exclude competition in the San Jose market. AMC relies upon *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir.1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976), for the proposition that a 45-70% market share, if accompanied by other relevant factors, may support a finding of monopoly power. In *Sunkist*, this court observed that "it is now well settled that market share, while

being perhaps the most important factor, does not alone determine the presence or absence of monopoly power." *Id.* at 1204. We held that when Sunkist's market share, which ranged from 45% to 70%, was coupled with such factors as highly fragmented competition and Sunkist's acknowledged control over the supply market, the jury's finding of monopoly power could be sustained.

In the case before us, as in *Sunkist*, Syufy's 60-69% market share is accompanied by a fragmentation of competition. One of AMC's expert witnesses computed market shares for both first run films and the 100 top-grossing films for the period 1975 through 1980. These calculations indicated that while Syufy's share ranged from 71.8% to 54.7%, no competing exhibitor in the San Jose area ever had a greater share than 24.7% and in some years the top competitor's share was below 12%.

In addition to the factors of Syufy's market share and the fragmentation of competition, there was evidence of a third factor that the jury could have considered in finding that Syufy had monopoly power in the relevant market—barriers to prospective competitors seeking entry to the market. There was testimony, for example, that while exclusive runs were becoming less and less common in other parts of the country, they persisted in the San Jose market, and that exclusive runs were probably a deterrent to the establishment of more theaters in the area. Still another indicator of barriers to entry was the evidence that Syufy extracted excessive clearances from distributors of certain films.[6] Viewed in the light most favorable to AMC, the evidence would permit a rational jury to find that barriers to entry existed in the San Jose market.

Finally, as evidence that Syufy had monopoly power, AMC cites the testimony of AMC's expert witness, Maurice Silverman. His qualifications as an expert witness were based upon years of experience relating to the film industry in his capacity as an antitrust law-

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[6] We discuss the evidence on excessive clearances below in section B of this part of our opinion.

yer in the United States Department of Justice.[7] His conclusion that Syufy possessed monopoly power in the relevant market was based upon a cursory study of the San Jose film exhibition market, including an analysis of the market share statistics and the demographics of the area. On cross examination, Silverman admitted that he had failed to consider such basic indicators of monopoly power as barriers to entry, price differentials, and profit margins. Moreover, his study of the market did not include important variables such as clearances, attendances figures, or even the number of screens within the region. Reporter Transcript ("R.T.") at 3303-39. Despite these shortcomings, the jury was entitled to give Silverman's testimony some weight.

We conclude, consistent with *Sunkist*, that when the evidence is viewed in the light most favorable to AMC, Syufy's market share of 60-69%, when coupled with other evidence of additional factors, is adequate to support a jury determination of monopoly power in the market defined as the exhibition of anticipated top-grossing films in the San Jose area. Here the additional factors include the fragmentation of competition, the presence of barriers to entry, and the existence of excessive clearances. Moreover, the jury in this case could reasonably have assigned some weight to the testimony of AMC's expert witness, Maurice Silverman.

B. Willful Acquisition or Maintenance of Monopoly Power.

We have no difficulty finding substantial evidence in the record that Syufy willfully maintained its monopoly power in the San

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[7] Syufy objects for the first time on appeal to the admission of Silverman's testimony. Syufy argues that his opinion testimony had no basis in the evidence and further that his testimony should have been excluded because the identification of Silverman as an official antitrust enforcer prejudiced the jury. AMC replies that Syufy failed to object at trial and that hence it has waived its objection under Fed.R.Evid. 103. Syufy has fallen far short of demonstrating that the admission of Silverman's testimony was plain error. Despite the shortcomings of Silverman's testimony regarding the particular relevant market in question, he qualifed as an expert in antitrust matters, and although his testimony about the San Jose film exhibition market was of marginal value, it was not plain error to admit it.

Jose area. Daniel Marks, AMC's film buyer, testified that, in his opinion, Syufy had been engaging in buying clearances which were excessive, defined as clearances that encompass a greater geographical area than is justified for legitimate competitive reasons. R.T. at 2787-89. The clearance for a particular theater is excessive if it reaches beyond the geographic zone within which the theater draws significant numbers of customers. Marks's testimony—that Syufy had submitted bids with large guarantees and lucrative terms in order to obtain clearances that were excessive—is probative of the willful maintenance of monopoly power. Although Syufy can point to evidence in the record indicating that its clearances were not excessive, it is for the jury, not this court, to resolve such evidentiary conflicts.[8]

C. Causal Antitrust Injury.

In addition to Mark's testimony that Syufy had engaged in the practice of buying excessive clearances, Marks also testified that AMC had been injured as a result of such clearances. This testimony was not challenged by Syufy on cross-examination or otherwise. Marks, as AMC's film buyer, was qualified to give his opinion on this issue. Although Marks's testimony was not supported by specific examples, it stands as sufficient evidence to support a jury finding of causal antitrust injury.

In conclusion, we hold that there is substantial evidence to support a jury verdict in favor of AMC on its first Section 2 monopolization theory: that Syufy monopolized the market for the exhibition of industry anticipated top-grossing films in the San Jose area.

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[8] Marks testified that in his opinion the Syufy domed theaters and AMC's Oakridge theaters were not in substantial competition with each other. Although Marks may have contradicted himself by stating that the AMC's Old Mill theater, which is located farther away from the Syufy domes than either the Saratoga or Oakridge theaters, had some competitive effect on Syufy's domed theaters, it is the province of the jury to judge credibility and choose from conflicting inferences. R.T. at 3120.

II. THE THEORY THAT SYUFY LEVERAGED ITS MONOPOLY POWER IN THE DRIVE-IN MARKET IN ORDER TO GAIN A COMPETITIVE ADVANTAGE IN THE HARDTOP MARKET

AMC's second monopolization theory is that Syufy used its undisputed monopoly power in the San Jose drive-in theater market as leverage to influence the licensing of films in the hardtop theater market[9]. AMC claims that Syufy leveraged its drive-in monopoly power in a way that restricted AMC's ability to license major motion pictures for exhibition in its hardtop theaters. AMC points to restrictive bids submitted by Syufy for its drive-in theaters as evidence of this leverage power. Such bids offered to play a particular motion picture in its drive-in theaters on the condition that the film could play only one hardtop theater in the area. For example, Syufy submitted a bid to the distributor of *The Electric Horseman* to have that film play in Syufy's Capitol Drive-in Theater. The bid contained the following condition: "First to play with one hardtop". This condition, if accepted by the distributor, would have restricted the licensing of *The Electric Horseman* to a single hardtop theater in the San Jose market. Because Syufy owned a majority of the large hardtop theaters in the San Jose area as well as all the drive-ins, a distributor acceptance of the restricted bid for *The Electric Horseman* could readily have led to an exclusive run of the film at a Syufy hardtop theater.

AMC's leverage theory is analagous to one advanced by the government in *United States v. Griffith*, 334 U.S. 100, 103-04, 68 S.Ct. 941, 943-44, 92 L.Ed. 1236 (1948). There the government claimed that four film exhibitors who owned all the theaters in one town leveraged their monopoly position to influence the licensing of films in another town where the film exhibition

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[9] The district judge's instructions to the jury discussed the leveraging theory as a component of the general section 2 monopoliazation claim. But the legal and evidential requirements of the two theories are so distinct (e.g., the existence and impact of monopoly power in another market) as to merit separate treatment.

business was highly competitive. The Supreme Court stated in *Griffith:*

> A man with a monopoly of theaters in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. . . .
>
> The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations.

334 U.S. at 107-08, 68 S.Ct. at 945-46. Thus, under the *Griffith* analysis, Syufy would violate Section 2 if it acquired "exclusive privileges" in the hardtop theater market by using its monopoly of drive-in theaters as a "trade weapon" against its hardtop competitors.

And yet, a restrictive Syufy bid standing alone does not prove a claim of monopolization. To demonstrate causal antitrust injury from Syufy's use of leverage, AMC must also prove that one or more of Syufy's restricted bids were accepted by distributors, and that as a result Syufy gained a competitive edge in the hardtop market in the form of an exclusive run in a Syufy hardtop theater. Thus it is not sufficient for AMC to prove that Syufy made the restrictive bid on *The Electric Horseman;* it must also prove that the bid was accepted and that as a result *The Electric Horseman* was booked into a Syufy hardtop theater for an exclusive run. In short, AMC must prove that Syufy succeeded in its alleged scheme to leverage its monopoly power in the drive-in market to acquire "exclusive privileges" in the hardtop market.

We agree with Syufy that AMC's leverage claim fails for lack of proof that Syufy succeeded in acquiring a single exclusive hardtop run by submitting restricted bids on films to exhibit in its

drive-in theaters.[10] The only evidence[11] relevant to AMC's leverage theory is a list of nine films for which Syufy allegedly made restricted bids. Defendants' Exhibit 8135. The list is sketchy in detail and vaguely cross-referenced to other supporting exhibits. When closely examined on a film-by-film basis, it fails to yield substantial evidence to support AMC's Section 2 leverage claim. As to seven of the nine films on the list, there is no evidence of distributor response one way or the other[12] As to one of the two remaining films—*The Electric Horseman*—the evidence shows that the restricted bid was rejected by the distributor. The evidence shows that a restricted bid for only one of the nine films—*The China Syndrome*—was accepted. But the evidence also shows that *The China Syndrome* never played at a Syufy hardtop theater. Thus the evidence fails to prove that Syufy ever succeeded in leveraging its monopoly power in the drive-in theater market to obtain exclusive licenses for films in the hardtop market. The record simply fails to yield any evidence of causal antitrust injury. We hold that AMC's leverage theory fails for lack of proof.

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[10] Thus, we need not enter into the debate concerning the anticompetitive effects of leverage. *Compare* 5 P. Areeda & D. Turner, *Antitrust Law* ¶ 1129c, 1134b (1980), and R. Bork, *The Antitrust Paradox* 140-44, 372-75 (1978) *with* L. Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum.L.Rev. 515 (1985).

[11] AMC's brief does include citations to other portions of the record that are alleged to support the leverage theory. But we find these citations to be totally unhelpful. One citation to page 2494 of the Reporter's Transcript leads us to testimony that bears no relationship to the proposition AMC claims it supports. The other citation, to pages 3257-58 of the Transcript, leads us to testimony by Silverman expressing a legal opinion that *if* Syufy successfully used leverage it would be guilty of monopolization.

[12] In addition, four of the nine films were not included in the product market defined by AMC, which was the only market in which AMC claimed causal antitrust injury and damages.

III. THE ATTEMPTED MONOPOLIZATION CLAIM

AMC relies upon two discrete theories in support of its claim that Syufy attempted to monopolize the hardtop theater market in violation of Section 2 of the Sherman Act. The first theory was a variation of its failed leverage theory. AMC claims that Syufy attempted to monopolize the hardtop theater market by attempting to use its monopoly power in the drive-in market to license films in Syufy's hardtop theaters on an exclusive basis. This theory fails for the same reason—lack of evidence of causal antitrust injury—AMC's monopolization claim based upon a leverage theory fails.

AMC's second theory of attempted monopolization is more straightforward: that Syufy attempted to monopolize the hardtop market. It is clear that a case of attempted monopolization cannot be sustained in the absence of any of the following elements: (1) specific intent to monopolize, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) causal antitrust injury. *See Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir.), *cert. denied*, 464 U.S. 955, 104 S.Ct. 370, 78 L.Ed.2d 329 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027-29 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 61 (1982); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964); *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 504 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978).[13]

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[13] The question whether "dangerous probability of success" is an element of attempted monopolization appears to have generated a measure of confusion in this circuit. *Compare Lessig v. Tidewater Oil Co.*, 327 F.2d 459 ("dangerous probability of success" not an element of attempted monopolization) *with Transamerica Computer Co., Inc.*, 698 F.2d 1377, 1382 (9th Cir.1983) ("dangerous probability of success" is an element) and *California Computer Prods., Inc.*, 613 F.2d at 736 (same). Because of its large market share, Syufy cannot seriously argue that AMC's attempted monopolization claim fails on the ground that AMC failed to prove "dangerous probability of success." For this

A. Specific Intent

As evidence of specific intent to monopolize, AMC cites the testimony of its chief executive officer, Mr. Durwood, concerning a conversation he had with Mr. Syufy, the chief executive officer of Syufy. The relevant portions of the testimony follow:

> Q. And can you tell us what Mr. Syufy told you and what you told Mr. Syufy?
>
> A. Well, we had—we had met in Los Angeles when we discussed trying to buy—making us an offer of the depreciated book value, and so on, which didn't excite me too much.
>
> Q. That's what you told us about this morning, correct?
>
> A. Yes.
>
> Q. Can you concentrate on this phone call that you just identified?
>
> A. On the phone call he said—his voice hit a crescendo. He got pretty high decible count. He threatened to sue. He's going to start a massive building program against us if we didn't sell out.
>
> San Jose is his town. He said he had 20 million dollars in cash and he was going to use it to build theatres against us.
>
> Q. Is that something that appears in your notebook, which is exhibit No. 50, sir?
>
> A. Yes, sir.
>
> Q. Did you write those notes down on or about the time of the phone call?
>
> A. As soon as I could get calmed down after hearing this conversation.
>
> Q. Is there anything else you can recall of this conversation with Mr. Syufy?

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reason, we need not address the question whether proof of "dangerous probability of success" is required.

> A. No. He reiterated he wanted the eight domes exclusive, he wasn't going to share any product with us. If we didn't get out of San Jose, he was going to run us out. And he had 20 million dollars he could do it with.

R.T. at 1774-75.

Although Mr. Syufy's remarks to Mr. Durwood are arguably consistent with a simple desire to succeed in free and open competition, the jury could reasonably have inferred a specific intent to monopolize from the threat to run AMC out of town.

B. Anticompetitive Conduct

As to the second element of attempted monopolization—anticompetitive conduct—the Marks testimony that Syufy had bought excessive clearances, discussed in Part I-B above with respect to AMC's hardtop monopolization claim, also serves as substantial evidence of anticompetitive conduct. If Syufy did indeed buy more clearance than needed for legitimate competitive reasons, then it engaged in conduct that would have been indisputably anticompetitive.

C. Causal Antitrust Injury

We agree with AMC that there was adequate evidence before the jury to support a finding that antitrust injury was caused by Syufy's anticompetitive conduct in obtaining excessive clearances. The Marks testimony offered with respect to causal antitrust injury on the hardtop monopolization claim is also substantial evidence of causal antitrust injury with respect to the attempted monopolization claim.

In sum, we hold that the district court did not err in denying a judgment n.o.v. on AMC's attempted monopolization claim.

IV. CONSPIRACY TO MONOPOLIZE CLAIM

The final theory of liability submitted to the jury on AMC's counterclaim was that Syufy conspired with film distributors to monopolize the San Jose market in violation of Section 2 of the Sherman Act. At trial, the district court submitted the Section 2 conspiracy claim to the jury even though it granted a directed

verdict on AMC's Section 1 conspiracy claim.[14] Because AMC did not cross-appeal the directed verdict on the Section 1 claim, we are faced with an unusual situation in that we must review a Section 2 conspiracy claim which is unaccompanied by a Section 1 conspiracy claim.[15] As Professors Areeda and Turner have observed,

> [E]very combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint of trade, without the need for considering the additional complexities that flow from using the § 2 monopoly concept. There is therefore no need whatever to try to define the content of the § 2 conspiracy.

3 P. Areeda & D. Turner, Antitrust Law ¶ 839 (1978). Although we are not required in the case before us to decide the question whether a Section 2 conspiracy is always actionable under Section 1, we are required by the unusual posture of this case "to define the content of the Section 2 conspiracy."

Our task is complicated because the nature of AMC's Section 2 conspiracy claim is murky at best. AMC claims it proved a conspiracy to monopolize between Syufy and the major film distributors, but fails to specify whether it is talking about a single grand conspiracy involving all the major distributors and Syufy, or about six separate conspiracies, each one involving a single

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[14] On appeal, Syufy claims that the district court submitted the Section 2 conspiracy claim to the jury inadvertently because it overlooked the directed verdict it had granted on the Section 1 claim. The record is clear, however, that the district court acted deliberately in submitting the Section 2 conspiracy claim to the jury. It did so after counsel for Syufy called the court's attention to the directed verdict on the Section 1 claim. We also note that appellant did not object to jury instructions on the Section 2 conspiracy claim.

[15] Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." 15 U.S.C. § 1 (1982). The relevant portion of Section 2 reads, "Every person who shall . . . combine or conspire with any other person or persons, to monopolize any part of commerce shall be deemed guilty of a felony." 15 U.S.C. § 2 (1982).

distributor and Syufy. In any case, we hold that the district court should have granted Syufy's motion for judgment n.o.v. with respect to the Section 2 conspiracy to monopolize claim because there is no evidence that any of the distributors, in licensing films to Syufy, knew or even should have known that Syufy would use the film licenses for monopolistic purposes. Nor is there any showing that any of the distributors shared with Syufy a common purpose in monopolizing the hardtop theater market in the San Jose area.

As we read the cases, a supplier who licenses a product to another does not join the licensee in a conspiracy to monopolize merely because the licensee turns around and exploits the license for its own monopolistic purposes. Some courts have said that a specific intent to monopolize is required to make one a Section 2 conspirator. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir.1983); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981). In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948), the Supreme Court held that acquiescence in conduct with knowledge that it was anticompetitive was sufficient to establish a Section 1 conspiracy. *Id.* at 146–47, 68 S.Ct. 915. But we know of no authority that a Section 2 conspiracy may be established without some showing that more than one of the alleged co-conspirators had at least some awareness that the underlying conduct was anticompetitive or monopolistic.

In support of its conspiracy claim, AMC cites evidence that distributors accepted bids from Syufy requesting excessive clearances. But there is no evidence that any distributor had any reason to know when accepting Syufy bids that the requested clearances were excessive for the San Jose market. AMC also cites in support of its Section 2 conspiracy claim the evidence of Syufy's attempts to condition the licensing of films in its drive-in theaters on exclusive runs in hardtop theaters. But as we have already pointed out (*see* Part I, *supra*), the evidence shows that only one such bid was accepted by a distributor and the film involved in that bid was not shown in a Syufy hardtop theater. That evidence is plainly inadequate to support a jury verdict that

Syufy and the distributor conspired to monopolize the San Jose exhibition market.

Finally, AMC argues that San Jose was the only market in which exclusive runs occurred, but cites no evidence connecting this characteristic of the San Jose market to a conspiracy to monopolize between Syufy and any of its distributors.

In conclusion, we hold that the district court erred in denying Syufy's motion for judgment n.o.v. on AMC's conspiracy to monopolize claim.

V. EVALUATION OF THE GENERAL VERDICT

Having decided that the district court should have granted Syufy judgment n.o.v. on two of the four AMC theories submitted to the jury, we must now decide whether the jury verdict should nonetheless be upheld on the strength of either of the two surviving theories. As a rule, a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S.Ct. 1130, 1135-36, 8 L.Ed.2d 305 (1962). In *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir.1985), this court was faced with a case submitted to the jury on three theories of liability: strict liability, breach of warranty, and negligence. Citing *Sunkist*, we held that "the judgment must be reversed if any of the three theories is legally defective." 767 F.2d at 1294. Nevertheless, this court has also held that when one but not all of the theories submitted to the jury lacks evidentiary support, "the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error." *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir.1980). We need not resolve this apparent conflict, because the general verdict in this case does not survive the test enunciated in *Traver*.

The factors to be weighed in exercising discretion were outlined in *Traver* as follows:

> In deciding whether to exercise this discretion, the reviewing court should determine the potential for confusion of the jury

> which may have resulted from an erroneous submission of a particular claim or cause of action, whether privileges or defenses of the losing party apply to the count upon which the verdict is being sustained so that they would have been considered by the jury with reference to the count, the strength of the evidence supporting the count being relied upon to sustain the verdict, and the extent to which the same disputed issues of fact apply to one or more of the theories in question.

627 F.2d at 938-39.

Initially, we note that potential for confusion of the jury in the instant case was great. The jury was confronted with a complex case involving multiple antitrust theories. Although many of the claims shared common issues of fact, each claim also involved distinctive legal and factual components. We believe there was substantial risk of jury confusion resulting from the erroneous submission of the leverage theory and conspiracy to monopolize claim.

The next relevant factor under *Traver v. Meshriy* is the strength of the claims that were properly submitted to the jury. This factor also weighs against the exercise of our discretionary power to attribute the general verdict to one of the two theories—monopolization and attempted monopolization of the hardtop major film exhibition market—that were supported by substantial evidence. Our review of the evidence leads us to conclude that AMC's case against Syufy was marginal even with respect to these two theories. AMC relied almost exclusively on the conclusory opinion testimony of its own film buyer, Daniel Marks, to fill in crucial gaps in their evidence. Marks's conclusory testimony that Syufy was buying excessive clearances is hardly strong evidence of Syufy's willful maintenance of monopoly power. Moreover, his testimony that AMC suffered causal antitrust injury from excessive clearances was vague as well as conclusory. In fact, it barely qualifies as substantial evidence to support a jury finding on this critical element of AMC's case. Especially given the lack of supporting data with respect to specific theaters and films, we conclude that AMC did not present to the jury a strong case of either monopolization or

attempted monopolization. Accordingly, we hold that this is not an appropriate case under *Traver v. Meshriy* for exercising our discretion to attribute the jury verdict to one of the two AMC theories that were properly submitted to the jury.

VI. THE CLAIMED ERROR IN ADMISSION OF EVIDENCE CONCERNING ACQUISITION OF THE MANN THEATER

Syufy argues that the admission of evidence concerning Syufy's acquisition of the Town and Country Theatre was prejudicial error. Syufy argues that because the Town and Country Theater was acquired after 1975-79, the period at issue, the acquisition was not relevant. We disagree. First, the evidence was relevant to Syufy's specific intent to monopolize. Behavior after the relevant period could shed light on intentions during that period. The district court gave a cautionary instruction to the jury that the evidence was only to be considered on intent. R.T. at 2812. Second, Syufy opened the door to evidence concerning this transaction by first raising the issue in its questions, R.T. at 1734, and by introducing evidence of AMC's post 1979 conduct. R.T. at 158-59.

VII. THE BASIS FOR THE AWARD OF DAMAGES

AMC based its calculation of damages on two comparisons. First, based on a comparison between AMC's Oakridge and Saratoga theaters with the Old Mill Theater in Mountain View near the San Jose region, AMC introduced evidence that it lost $2,423,380 in profits. Second, based on a comparison between AMC's San Jose theaters and AMC's Phoenix area theaters, AMC introduced evidence that it lost $1,593,822 in profits. The jury awarded AMC damages in the amount of $1,006,410.

Syufy argues that AMC's damage calculations were flawed for two reasons. First, Syufy argues that damages may not be calculated on the basis of a comparable market, unless the damaged competitor was totally excluded from the market dominated by a monopolist. Syufy relies on *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978), and *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17 (9th Cir.1971), to support this contention. As we read these cases, however, neither supports Syufy's

challenge to the amount of damages. Both cases held that market comparisons cannot be used to establish the fact of causal antitrust injury unless the monopolist's victim is totally excluded from the market. *Admiral Theatre Corp.*, 585 F.2d at 893-94; *Dahl, Inc.*, 448 F.2d at 19. Proof of the amount of damages is governed by a less stringent standard of proof than is the fact of injury. *See Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927). Syufy cites no authority for the proposition that comparisons may not be used to establish the amount of damage in a market in which the victim of a monopolist competes.

Syufy's second challenge to AMC's damage calculations is based on the contention that the Mountain View and Phoenix markets are not comparable to the San Jose market. Syufy argues that during part of the relevant period, exhibitors in Phoenix engaged in an illegal "split agreement," which Syufy claims was a per se violation of the antitrust laws. Syufy argues that this illegal conduct inflated AMC's Phoenix profits, rendering them an invalid basis for comparison. Comparability is a question of fact. The "split agreement" was in existence for only part of the period of comparison, and there was testimony that the two markets were comparable. It was for the jury to consider Syufy's arguments about the effect of the split on the validity of comparison and to adjust its damage award accordingly. There was sufficient evidence to allow a jury to render a damage award for AMC on the basis of the comparison between San Jose and Phoenix.

In addition, Syufy argues that the Mountain View region is not comparable to San Jose because there was less bidding competition in Mountain View. Again, AMC presented evidence that the two markets were comparable. It is for the jury and not for us to weigh the conflicting evidence. We conclude that AMC presented sufficient evidence to support the damages awarded.

CONCLUSION

In conclusion, we affirm the district court's order, 555 F.Supp. 418, denying Syufy's motion for judgment n.o.v. with respect to two of the theories submitted to the jury—monopolization and

attempted monopolization of the hardtop market. We reverse the district court's order denying Syufy's motion for judgment n.o.v. regarding the conspiracy to monopolize claim. In addition, we hold that there was insufficient evidence supporting AMC's theory that Syufy used its monopoly power in the drive-in market as leverage on the hardtop market. We also hold that this is not an appropriate case for invocation of our discretionary power to affirm a general verdict. Accordingly, we remand to the district court for further proceedings not inconsistent with this opinion with respect to the two theories that were supported by sufficient evidence and for dismissal of the theories not supported by sufficient evidence.

Affirmed in part, reversed in part and remanded.

Appendix B

Appendix B

Syufy Enterprises, Plaintiff,

v.

American Multicinema, Inc.,
AMC Film Management, Inc., and
Durwood, Inc., Defendants.

No. C-79-3052 WHO.

United States District Court,
N.D. California.

July 28, 1982.

MEMORANDUM OPINION

ORRICK, District Judge.

In this difficult and complex antitrust action in which two motion picture exhibitors, namely, Syufy Enterprises ("Syufy"), as plaintiff and counterdefendant, and American Multi-Cinema, Inc. and its related entites ("AMC"), as defendants and AMC as counterplaintiffs, charged each other with violating Section 2 of the Sherman Act by attempting to monopolize and monopolizing the exhibition of first-run motion pictures in the San Jose, California, area, a jury, following a five-week trial, returned a verdict in favor of AMC and assessed damages (before trebling) against Syufy in the amount of $1,006,410. For the reasons which follow, Syufy's post-trial motions for judgment *non obstante veredicto*, or, in the alternative, for a new trial on the counterclaim and, additionally, for a new trial on its Section 2 ciaim against AMC are DENIED.

I

A

Syufy is an independent motion picture theatre operator which owns and operates over 150 motion picture exhibition screens located in various western states. Defendants are three related corporations: AMC, which owns and operates motion picture exhibition screens located throughout the United States; AMC

Film Management, Inc. ("Film Management"), which acts as a film buying and booking agent for AMC and for various other theatre owners; and Durwood, Inc. ("Durwood"), a holding company which owns a controlling interest in both AMC and Film Management.

Since April, 1973, both Syufy and AMC have owned and operated motion picture exhibition screens in Santa Clara County, California, the focal point of this lawsuit. There are at present thirty major walk-in motion picture theatres ("hardtops"), with a total of seventy-one screens, being operated in Santa Clara County. AMC operates the Oakridge, Saratoga, Old Mill, and Sunnyvale Theatres, a total of twenty-four screens; and Syufy operates the Century 21, Century 23, Century 24, Century 25, and the Century Almaden Theatres, for a total of fifteen screens, and also operates four drive-in theatre complexes in the area. The remaining hardtop theatres in Santa Clara County are operated by United Artists Theatres (eight screens), Blumfield Theatres (eight screens), Jack Gunsky (three screens), and Mann Theatres (one screen).

Syufy and AMC compete with each other for the right to license first-run motion picture films from distributors and to exhibit such films in theatres situated in Santa Clara County, among other places. A brief description of the manner in which motion picture films are licensed for exhibition is helpful in understanding the claims raised by the parties in this case.

The right to exhibit motion picture films under copyright is licensed to exhibitors by distributors on terms and conditions contained in license agreements. Motion pictures can be licensed either by bid or by negotiation. When a distributor licenses a motion picture on a bid, it first sends out a bid invitation to the exhibitors in a particular geographical area announcing the availability date of the motion picture being released. The bid invitation often includes the minimum film rental (calculated as a percentage of the gross theatre admission receipts), and minimum terms (such as a specified minimum film rental and/or advance film rental) that will be acceptable to the distributor, and may also specify whether the picture is being offered on an "exclusive" basis, so that only one theatre in a particular area can exhibit the picture during a given run, or on a "nonex-

clusive" ("day and date") basis. The distributor may in turn accept one or more bids, or reject all bids and rebid the picture, or enter into negotiations with interested exhibitors for the licensing of that motion picture.

In order to earn a profit for the exhibitor, a theatre must gross more than its operating expense and the cost of film rental paid to the distributor. Thus, in bidding for a particular film, the exhibitor must first evaluate the potential gross of the motion picture and submit a bid offer of film rental to the distributor high enough to obtain the award of the picture, but not so high as to incur losses in exhibiting the film.

On October 31, 1979, Syufy brought this action for damages and injunctive relief pursuant to 28 U.S.C. § 1337, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Sections 4, 12 and 16 of the Clayton Act, as amended, 15 U.S.C. §§ 15, 22, 26, and California Business and Professions Code Sections 16,600 *et seq.*, 16,720 *et seq.* and 17,000 *et seq.* The gravamen of the complaint is that, commencing in April, 1973, when AMC opened its first theatre in Santa Clara County, AMC and its related entities combined among themselves and conspired with various motion picture distributors to restrain trade in the exhibition of first-run motion pictures in Santa Clara County and to monopolize the relevant market through conduct violative of Sections 1 and 2 of the Sherman Act and state unfair competition laws.

The complaint sets forth eight specific actions and/or courses of conduct allegedly engaged in by defendants with the purpose and intent of destroying Syufy's ability to compete for first-run motion pictures in Santa Clara County:

1. Hiring away Syufy's head film buyer in order to learn Syufy's confidential business operations and to disrupt and cripple Syufy's theatre operations in Santa Clara County;

2. Strategically surrounding Syufy's theatres in Santa Clara County with defendants' new theatres having eighteen screens and defendants' newest theatre, scheduled to open in February, 1980, with an additional six screens;

3. Consistently operating their Santa Clara County theatres below cost;

4. Subsidizing their Santa Clara County theatres, where defendants are competing against Syufy, with the profits obtained from their theatres and operations located outside of the greater San Jose metropolitan area where the defendants have either little or no competition;

5. Subsidizing the losses incurred by defendants in their theatres in competition with Syufy by funds generated out of defendants' nationwide network of theatre operations;

6. Establishing pocket monopolies by organizing buying and booking combines of exhibitors for the purposes of eliminating competition, creating noncompetitive profits, and funding predatory below cost bidding in areas where independent exhibitors, such as Syufy, refuse to become a part of defendants' combine policy;

7. Attempting to force and forcing independent exhibitors into splitting agreements; and

8. Block booking motion pictures in their theatres.

Syufy alleges that defendants, through the above-described conduct, have had and will continue to have the effect of substantially restraining competition in the distribution and exhibition of first-run motion pictures in Santa Clara County, and of increasing admission prices for the movie-going public.

On November 26, 1979, AMC filed its counterclaim for damages and injunctive relief for violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. AMC alleged that Syufy had at all relevant times possessed monopoly power in both indoor and drive-in exhibition of major films in the San Jose zone of Santa Clara County, and that Syufy used its monopoly power and conspired with various distributors and exhibitors to restrain trade and eliminate competitors, including AMC, in this market by engaging in the following conduct:

1. Syufy individually, and in combination, conspiracy, and agreement with the co-conspirators, has excluded AMC from the

opportunity to exhibit first-run motion picture films in Santa Clara simultaneously with the exhibition thereof at motion picture theatres owned and operated by Syufy through a system of unreasonable and unlawful clearances. Syufy has made as a condition of its bid or negotiation to license first-run motion picture films that AMC's theatres in Santa Clara be excluded from any simultaneous run thereof. The co-conspirators have agreed with, acquiesced in, and aided and abetted, Syufy in implementing and effectuating such unlawful system of clearances.

2. Syufy, in combination, conspiracy and agreement with the co-conspirators, has consistently and systematically entered into license agreements for the exhibition of first-run motion picture films in Santa Clara by the terms of which, among others, Syufy has agreed to pay substantially less as film rental than would have been paid by AMC pursuant to bids submitted by AMC for the exhibition of such films.

3. Syufy and the co-conspirators have by combination, conspiracy and agreement engaged in a systematic and concerted practice a d pattern of excluding AMC from the opportunity to compete fairly with Syufy for the right to exhibit first-run motion picture films in Santa Clara. Such practices include, but are not limited to, the rigging of bids and sham awarding to Syufy of license agreements by the co-conspirators. The co-conspirators have made available to Syufy prior to licensing of films all information regarding sealed bids made by AMC therefor, and the co-conspirators have granted Syufy the opportunity of licensing such films by meeting the terms and conditions of sealed bids submitted by AMC.

4. Syufy has conditioned its licensing of first-run motion picture films at its drive-in theatres in Santa Clara upon the co-conspirators' awarding license agreements to Syufy for the exhibition of films at Syufy's hardtop theatres under terms and conditions substantially inferior to those terms and conditions under which AMC has offered to license such films for exhibition by AMC.

B

During the course of this litigation, the Court made several important rulings that substantially narrowed the scope of the lawsuit and the number of claims that were ultimately submitted to the jury.

On July 17, 1980, the Court issued its pretrial order, setting March 3, 1981, as the date for the termination of discovery and for the filing of pretrial statements, including the identification of any proposed amendment to the pleadings, in accordance with Local Rule 235-7. The trial date was set for March 23, 1981, but was subsequently continued to November 30, 1981.

On April 10, 1981, five weeks *after* the discovery cutoff date, the Court held a further pretrial conference, during which it determined that Syufy had failed to comply with the provisions of the Court's pretrial order governing the conduct of discovery. The Court found that Syufy had failed to respond adequately to numerous interrogatories and requests for documents and, most importantly, had failed to provide specific information underlying Syufy's claim for conspiracy under Section 1 of the Sherman Act. The Court, pursuant to Rule 37(b)(2)(B) of the Federal Rules of Civil Procedure, imposed monetary sanctions upon Syufy, and ruled that it would limit the evidence that could be introduced at trial in support of Syufy's Section 1 claim and would strip certain issues from the trial because of Syufy's unjustifiable and repeated failure to afford adequate discovery. R.T. p. 6, line 20—p. 8, line 14.

On April 24, 1981, Syufy moved for leave to amend its complaint in order to include, *inter alia*, the identification of six major motion picture distributors as alleged "co-conspirators" and certain additional acts and/or courses of conduct allegedly engaged in by the defendants and the "co-conspirators." After still another hearing on May 29, 1981, the Court denied the motion for leave to amend, on the grounds that Syufy's delay in seeking to amend the complaint was inexcusable because Syufy possessed the relevant facts prior to the discovery cutoff date, and that the proposed amendments would significantly broaden the scope of the lawsuit, necessitating additional discovery, imposing

unjustifiable hardship upon defendants, and coming dangerously close to "trial by ambush." R.T. p. 3, line 13—p. 11, line 7.

On June 23, 1981, Syufy filed a second lawsuit, No. C-81-2642 WHO, based upon a new complaint substantially identical to the first complaint, but setting forth the allegations which Syufy had sought to include by way of amendment. On September 18, 1981, the Court, noting that the second lawsuit appeared to be an attempt to circumvent the Court's prior rulings, denied Syufy's motion to consolidate the two actions for trial, and granted defendants' motion to stay all discovery in the second case pending entry of judgment in the first case.[1] R.T. p. 12, lines 7-13; p. 23, lines 20-24.

On November 6, 1981, the Court granted defendants' motion for summary judgment on Syufy's Section 1 claim, ruling that the three named defendants, AMC, Film Management, and Durwood, constituted a single business entity, and thus that the threshold requirement of Section 1 of a plurality of actors had not been met. On November 20, 1981, the Court granted defendants' motion for partial summary judgment on any damage claim arising out of the licensing and exhibition of motion picture films that were bid subsequent to October 31, 1979, and denied defendants' motion for summary judgment on the allegations contained in Section 11(f) of the complaint pertaining to defendants' alleged plan to destroy Syufy in retaliation for Syufy's refusal to participate in an alleged buying and booking combine.

At the close of all the evidence at trial, the Court granted Syufy's motion for a directed verdict on AMC's counterclaims under Section 1 of the Sherman Act and Section 3 of the Clayton Act, on the grounds that AMC had not presented sufficient evidence of these claims to warrant their submission to the jury. The Court took under submission Syufy's motion for a directed

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[1] On May 28, 1982, following the trial of the first action, the Court reiterated its concern that allowing Syufy to proceed with the second lawsuit would effectively permit it to circumvent the sanctions earlier imposed by the Court, and suggested that counsel for AMC move to dismiss the second lawsuit. R.T. p. 3, line 4—p.5, line 17. Thus far, counsel has not responded to the Court's suggestion.

verdict on its Section 2 claim against defendants and on AMC's Section 2 counterclaim.

On January 7, 1982, Syufy's Section 2 claim that AMC attempted to monopolize the exhibition of first-run films in Santa Clara County, and AMC's Section 2 claim that Syufy had a monopoly and attempted to monopolize the exhibition of major first-run films in the San Jose zone, were submitted to the jury. On January 8, 1982, the jury returned a verdict for AMC and against Syufy on the affirmative complaint, and for AMC and against Syufy on the counterclaim, and awarded AMC $1,006,410 in damages. Judgment was entered on the verdict on February 11, 1982, and Syufy's motions for judgment *non obstante veredicto*, or, in the alternative, for a new trial on the counterclaim, and for a new trial on the affirmative complaint followed.

II

The standards for granting a judgment *non obstante veredicto* are the same as those for granting a directed verdict, and the well-settled rule is that a court may grant a motion for judgment *non obstante veredicto* only if, without passing upon the credibility of the witnesses, it finds that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, does not provide "substantial evidence" in support of the verdict. *See, e.g., In Re Data General Antitrust Litigation*, 529 F.Supp. 801, 812 (N.D.Cal.1981); *Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1981). "Substantial evidence" has in turn been described as more than a "mere scintilla" and as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938). Where the evidence is "substantial," the Court is not free to weigh the evidence for itself or to reach a result that it finds more reasonable. *Inglis, supra.*

By contrast, the standard for granting a new trial permits the Court to consider the weight of the evidence and the credibility of the witnesses, and the Court may set aside a verdict, even if it is supported by substantial evidence, if it is contrary to the clear

weight of the evidence or is based upon evidence which is false, or whenever in the exercise of sound discretion the trial judge thinks his action necessary to prevent a miscarriage of justice. *Id.*at 1027.

III

Application of the legal standards set forth above to the evidence presented in this case leads to the conclusion that Syufy's motion for judgment *non obstante veredicto,* or, in the alternative, for a new trial on AMC's counterclaim for monopoly and attempt to monopolize must be denied.

A

With respect to the monopoly claim, Syufy first contends that, given the existence of a competitive bidding market, and absent evidence of complicity between exhibitors and distributors, the unilateral action of an exhibitor cannot give rise to liability for monopoly as a matter of law. Syufy's position rests on the rationale that competitive bidding assures all exhibitors in a given area equal access to films, and that an exhibitor in such a market cannot be held liable for monopoly, even if he is awarded 100 percent of the films, because it is the distributor, and not the exhibitor, who ultimately decides where motion pictures will be exhibited. The Court rejects this novel legal theory, raised for the first time in Syufy's post-trial motion, noting that such a rule has never been articulated in the case law and that, in any event, it is the very question as to whether each exhibitor is able to receive fair consideration for his bid which lies at the heart of this lawsuit.

Syufy further contends that, even if a finding of monopoly power is not precluded as a matter of law in this case, the verdict cannot stand because there was a critical failure of proof as to each of the elements necessary to establish a claim for monopoly. The essential elements that must be proved to establish a claim for monopolization under Section 2 of the Sherman Act are: (1) the possession of monopoly power in a relevant market; (2) the willful acquisition or maintenance of such power; and (3) causal antitrust injury. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Greyhound Computer Corp.*

v. IBM, 559 F.2d 488 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978).

With regard to the first element, the possession of monopoly power in a relevant market, the Court finds that AMC's definitions of the relevant product and geographic markets were supported by substantial evidence, and that AMC presented sufficient evidence of Syufy's market share and its power to support a jury finding of monopoly power. The Court instructed the jury as to Syufy's definition of the relevant market, "the exhibition of first-run films in Santa Clara County, from the Southern Boundary of the San Jose Zone to the San Mateo County Boundary," and AMC's definition of the relevant market, "major first-run film licensed for exhibition in the San Jose Zone, or alternatively, the San Jose Zone and Sunnyvale," and explained to the jury that it was free to accept the definition proposed by either of the parties or to develop its own definition of the relevant markets based on the evidence. Substantial evidence was adduced at trial in support of AMC's position that "major" first-run films, those twenty to forty films which the industry anticipates will have superior box office grossing potential, constitute an economically significant, industry-recognized product submarket, and that the San Jose zone is an appropriate geographic market, based upon commercial realities of motion picture exhibition and encompassing the area in which Syufy and AMC were engaged in substantial competition.

AMC established the existence of Syufy's monopoly power in the relevant market through evidence showing that Syufy's market share was at all relevant times greater than 62 percent, and expert testimony suggesting that Syufy's market share was sufficiently high to justify an inference of monopoly power, given the fragmented distribution of the remaining market shares among competing distributors. AMC also demonstrated that Syufy possessed an essential hallmark of monopoly power, the power to exclude competition, through evidence that Syufty had successfully created barriers to entry by other major first-run film exhibitors at a time when the San Jose market had grown substantially and Syufy had more than doubled its own capacity.

With respect to the second element of a monopolization claim under Section 2, namely, the willful acquisition or maintenance of monopoly power, AMC presented substantial evidence at trial demonstrating that Syufy had engaged in anticompetitive conduct for the purpose of maintaining its monopoly power and eliminating competition in the market. Such conduct included Syufy's use of its monopoly power in the drive-in market to induce distributors to award exclusive hardtop runs by the submission of conditional drive-in bids; Syufy's use of predatory bidding to obtain exclusive runs; threats made by Syufy's owner, R.J. Syufy, against AMC; and Syufy's acquisition of its largest competitor, the Mann Theatre, shortly before the commencement of this lawsuit.

With respect to the third element required to establish monopoly, namely, causal antitrust injury, Syufy contends that AMC has failed to present any competent evidence demostrating that AMC earned lesser profits as a proximate cause of Syufy's alleged monopolization, and that the damage award must be set aside as speculative because AMC did not present any evidence of damages sustained on specific films at specific theatres. AMC's proof of fact and amount of damage rested on a comparability study which demonstrated that AMC's theatres in the relevant market were substantially less profitable than comparable AMC theatres in the markets of Mountain View, California, and Phoenix, Arizona. AMC presented testimony at trial establishing the comparability of these markets, and suggesting that the only plausible reason for the relatively poor performance of AMC's theatres in the San Jose market was the inability of those theatres to obtain a fair share of top first-run films. Under the applicable law, AMC was required to establish a reasonable probability that it lost profits at its San Jose theatres were proximately caused by Syufy's anticompetitive conduct, and was not required to negate all possible alternative explanations for such losses. *Greyhound, supra.* The Court finds that AMC introduced sufficient proof to permit the jury to infer that AMC sustained injury as a proximate result of Syufy's monopolization of major first-run films in the San Jose zone.

With regard to the amount of damage, the Court rejects Syufy's argument that a damage award is inherently speculative

unless based upon a picture-by-picture analysis. The use of the "yardstick" or comparison method of proving damages was first upheld in *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946), where the Court held that damages could be calculated by comparing the success of a given theatre before and after the onset of the anticompetitive conduct, or by comparing the performace of other theatres in different but comparable markets, where the decline in profits is not shown to be attributable to other causes. This comparison method has been approved in numerous antitrust cases since *Bigelow: See e.g., Shannon v. Crowley*, 538 F.Supp. 476 (N.D.Cal. 1981); *Fox West Theatres Corp. v. Paradise Theatre Building Corp.*, 264 F.2d 602 (9th Cir.1958); 11 Von Kalinowski, Antitrust Laws and Trade Regulation § 81.09(5). Furthermore, in the absence of any decisions explicitly holding that the comparison method of proving damages is limited to cases involving complete exclusion from the market and is inappropriate in cases where the plaintiff could or did bid for individual films, the Court rejects Syufy's argument that AMC's comparability study should be held insufficient to establish the amount of damages under the circumstances presented here.

B

Syufy's arguments with regard to AMC's claim for attempted monopolization under Section 2 of the Sherman Act are directed exclusively to the sufficiency of the evidence and in large part reiterate the arguments made with respect to AMC's monopolization claim, already rejected by this Court. The essential elements of a claim for attempt to monopolize under Section 2 are: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Inglis, supra.* Although these three elements are separate and distinct, it is clear that the existence of a dangerous probability of success may be inferred from evidence of specific intent to control prices or destroy competition, and predatory or anticompetitive conduct directed towards that end. *Id.* Indeed, the most recent decision in this Circuit to address the issue indicates that all three

elements of a claim for attempt to monopolize may be satisfied by evidence of conduct that is clearly threatening to competion or is clearly exclusionary. *Twin City Sportsservice, Inc. v. Charles O. Finley & Co.* 676 F.2d 1291 (9th Cir.1982).

Syufy's anticompetitive conduct, which was discussed in the context of Syufy's willful acquisition and maintenance of its monopoly power, above, and which took the form of using its monopoly position in the drive-in market to induce distributors to award exclusive hardtop runs, predatory bidding to obtain exclusive runs, and the acquisition of its largest competitor, the Mann theatre, was in itself sufficient to permit the jury to infer that Syufy possessed the specific intent required for attempt to monopolize. Moreover, AMC presented direct evidence of Syufy's anticompetitive intent in the form of threats by R.J. Syufy to run AMC out of town if AMC did not either sell out to Syufy or get out of San Jose. The probability that Syufy would be successful in obtaining a monopoly could in turn have been inferred from the evidence of Syufy's anticompetitive intent and conduct, and was further demonstrated by proof of Syufy's market power, which was always in excess of 62 percent. It has previously been demonstrated that AMC suffered causal antitrust injury attributable to Syufy's anticompetitive conduct. Thus, the Court finds that AMC has met its burden of presenting substantial evidence in support of each of the elements required to establish a claim for attempted monopolization in violation of Section 2 of the Sherman Act.

Having determined that Syufy is not entitled to judgment *non obstante veredicto* on AMC's counterclaim for monopolization, the Court further finds that Syufy's alternative motion for a new trial on the counterclaim must be denied, because it cannot be said that the verdict is contrary to the clear weight of the evidence or that allowing the verdict to stand would result in a miscarriage of justice.

Finally, Syufy urges this Court to set aside the verdict and grant a new trial on its claim against AMC, Film Management and Durwood for attempt to monopolize in violation of Section 2 of the Sherman Act. Syufy had every opportunity to present its claim to the jury, based upon evidence which included proof of defendants' alleged plan to eliminate competition among film exhibitors through the organization of buying and booking coop-

eratives. The jury could reasonably have found that the evidence of AMC's alleged intent to destroy Syufy as a competitior was unconvincing, or that defendants never engaged in conduct directed towards accomplishing that intent. In any event, the Court does not find that the evidence presented at trial in support of Syufy's Section 2 claim was so clear and overwhelmning as to justify granting a new trial.

IV

For the reasons stated above, the Court finds that the jury verdict is fully supported by the law and the evidence in this case, and that the judgment entered upon the verdict must stand. With respect to AMC's counterclaim for monopolization in violation of Section 2 of the Sherman Act, the Court rejects Syufy's argument that a finding of monopoly on the basis of an exhibitor's unilateral action in a bidding market is precluded as a matter of law, and finds that AMC presented substantial evidence at trial in support of each of the essential elements of a monopolization claim, namely, the possession of monopoly power in a relevant market, the willful acquisition or maintenance of such power, and casual antitrust injury. Similarly, with respect to AMC's counterclaim for attempt to monopolize in violation of Section 2, the Court rejects Syufy's arguments, which are directed exclusively to the sufficiency of the evidence, and finds that each of the elements necessary to establish a claim for attempt to monopolize, namely, specific intent to control prices or destroy competition, predatory or anticompetitive conduct, and dangerous probability of success, were proven by substantial evidence. Finally, with respect to Syufy's Section 2 claim against AMC for attempt to monopolize, the Court finds that, on the basis of the evidence presented at trial, the jury could reasonably have concluded that AMC did not engage in anticompetitive conduct causing injury to Syufy.

Accordingly, IT IS HEREBY ORDERED that Syufy's motions for judgment *non obstante veredicto* or, in the alternative, for a new trial on AMC's counterclaim under Section 2 of the Sherman Act, and for a new trial on its Section 2 claim against AMC, are denied.

Appendix C

Appendix C

Statutory Provisions Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

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No. 86-789

In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

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Petitioner,

vs.

SYUFY ENTERPRISES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RULE 28-1 STATEMENT

Respondent Syufy Enterprises ("Syufy") is a partnership. Syufy has no corporate parent, subsidiary or affiliate.

COUNTERSTATEMENT OF THE CASE

The petition asks this Court to consider AMC's claim that Syufy conspired to monopolize the motion picture exhibition market in San Jose, California. The irony of AMC's petition stems from the fact that it was AMC—not Syufy—who sought to conspire to monopsonize the San Jose market because AMC found that market too competitive for its liking. [RT 295, 2154-5, 2203-5] AMC President Durwood had proposed to Syufy and other theatre owners that they join him in a nationwide "cooperative" of exhibitors (codename "Mr. Cooper") who would band together and secretly allocate films among themselves in a "steamroom" rather than bid against one another. [RT 1271-4, 1898, 1903-4, 1922-4, 2164, 2169; PX 45.21] Durwood proposed to use the intensely competitive San Jose market as a model for

his cartel. [RT 1993, 2154-5, 2169, 2954] For these reasons and others, in denying injunctive relief the trial judge labeled AMC an "emergent monopolist" who was "a considerable threat to open competition in the San Jose market" and who, if "freed from any meaningful competition by Syufy, would become the unlawful, dominant force, the 'head gorilla,' in the market." [CR 360 at 5-6] *Syufy Enterprises v. American Multi-Cinema, Inc.*, 1983-82 Trade Cases ¶ 65,740 at p. 69, 779 (N.D.Cal. 1983).

Syufy flatly rejected AMC's illegal overtures. [RT 1922-4] Having failed to become the "head gorilla" in a conspiracy to monopsonize the fiercely competitive San Jose market [RT 1898, 1922-4, 1986, 1993, 2203-5], AMC turned around and accused Syufy of entering such a conspiracy with the motion picture distributors. [CR 8]

As the Court can see from AMC's Statement of the Case, however, AMC is still searching for a sound legal and economic theory to explain the surprise jury verdict it received on its counterclaim five years ago. Thus, AMC states that Syufy possessed a market share over 90% in 1973 and that it shrank to 70% as a result of Syufy's exclusionary, monopolistic conduct. [Petition at pp. 2-3] And although AMC claims that its "Oakridge and Saratoga theatres offered the distributors a superior alternative to the obsolete Syufy domes" [*Id.* at p. 4], the distributors for some unfathomable reason passed up this "superior alternative" and cut their own throats by conspiring to create a monopsony in their "obsolete" customer. With all due respect, Syufy submits AMC's conspiracy to monopolize claim simply does not make economic sense, never has made economic sense and, having been dismissed by the Court of Appeals, is unworthy of this Court's attention. *Cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, ____ U.S. ____, 106 S.Ct. 1348, 1356-7, 1360 (1986).

AMC would have this Court believe that exclusive licenses are an aberration, a method of film distribution unique to San Jose resulting from Syufy's coercive conspiracy with the distributors.[1]

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[1] The petition boldly states, without citation to any record evidence, that Syufy "coerced the distributors to act against their best economic interests." [Petition at p. 4] Perhaps AMC believes this Court is so far

As the record below makes clear, however, the impression AMC seeks to create is a false one. The whole San Francisco Bay Area revealed a pattern of exclusive runs, including San Francisco, Berkeley and Marin County, zones in which Syufy was not a factor. [RT 2659, 2666, 2668, 2399, 1126-9] Indeed, distributor McCafferty, whom AMC relied upon so heavily at trial and here, admitted that his company licensed exclusive runs in San Francisco, Denver, San Diego and Seattle where Syufy was not present to "coerce" the distributors [RT 2494] and the contemporaneous business records proved that numerous film licenses were offered to San Jose exhibitors by McCafferty's company (and the other distributors) on an exclusive basis only. [DX 5896-6731, 7036-7172] Even AMC's expert witness and its Senior Vice Presidents admitted that Syufy's exclusive licenses ("clearances") over AMC's San Jose theatres only a few miles away were, in fact, reasonable. [RT 3319-21, 2999-3000, 2238-9]

Hence the "evidentiary" predicate for the issues AMC brings to this Court is a hollow one; there was no direct evidence of an illegal conspiracy and no such inference could be drawn from the record. For this reason, the district judge granted a directed

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removed from the record that AMC can say anything to further its cause (regardless of whether it is true) because, at trial, AMC President Durwood sang a far different tune: Durwood called his own company, the third largest exhibitor in the country, relatively "teensy" when compared to any major distributor, he described the largest circuit as nothing more than a "fly in the soup" of the mighty film companies and railed against the latter's ability to force exhibitors to engage in blind bidding. [RT 1810-12, 1677] Nowhere does AMC suggest where "teensy" Syufy obtained the power to coerce any distributor to forego the allegedly "superior alternative" outlets offered by AMC in San Jose. Nor does AMC explain why the distributors licensed exclusive runs to San Jose exhibitors other than Syufy. [*See* DX 5896-6731 and 7036-7172] In fact, rather than establishing that the distributors were coerced into conspiring to grant exclusive licenses in San Jose against their economic interests, the petition proves just the opposite: as AMC tells the Court, with exclusive runs San Jose (despite its relatively small population) is one of the four largest grossing theatre markets in the country. [Petition at p. 2] *See Matsushita*, 106 S.Ct. at 1360-62 (where it would be economically irrational to enter conspiracy and conduct is consistent with plausible explanation, proof of conspiracy is lacking).

verdict against AMC's Sherman Act § 1 claim. [RT 3594-5] That ruling is now final and dispositive here; the Court should not entertain this petition which has no foundation in fact.

REASONS FOR DENYING THE WRIT

I

AMC'S CONSPIRACY TO MONOPOLIZE CLAIM IS BARRED AND THE PETITION IS THEREFORE MOOT

AMC's counterclaim charged Syufy with participating in a Sherman Act § 1 conspiracy with unnamed film distributors to restrain trade and a Sherman Act § 2 conspiracy with the film distributors to monopolize trade in the motion picture industry. [CR 8] Although the two antitrust conspiracy claims under the Sherman Act are distinct, they obviously share as a common element proof of conspiracy. AMC strenuously urges this Court to review the law applicable to its § 2 conspiracy claim but inexcusably fails to inform the Court that AMC's § 1 conspiracy claim was adjudicated adversely to it; the now-final determination that Syufy was not engaged in any conspiracy with any film distributors is binding upon AMC and renders this petition moot.

As Professors Areeda and Turner explain in their treatise, the § 2 conspiracy prohibition is "redundant" of § 1, since the latter offense is more easily proven: "Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1." P. Areeda and D. Turner III *Antitrust Law* at 358. *See also Alexander v. National Farmers Organization*, 687 F.2d 1173, 1193 (8th Cir. 1982). Dismissal of a lesser § 1 conspiracy charge necessarily mandates dismissal of the greater § 2 conspiracy claim. *Id.*; *Zenith Radio Corp. v. Matsushita Elec. Ind. Co., Ltd.*, 513 F.Supp. 1100, 1319-21 (E.D. Pa. 1981), *rev'd*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 106 S.Ct. 1348 (1986); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 118 (3d Cir. 1980), *cert. den.*, 451 U.S. 911 (1981).

On Syufy's motion for directed verdict [RT 3564], the district judge clearly dismissed AMC's § 1 claim that Syufy was engaged

with film distributors in a conspiracy to restrain trade for AMC's failure to prove the alleged conspiracy. [App. B-7; RT 3586, 3588, 3594-5][2] That directed verdict was incorporated in the district court's judgment. [CR 282] AMC took no appeal from the adverse portion of the judgment and, therefore, that judgment represents a final adjudication of the conspiracy issue. Insofar as AMC asks this Court to revitalize its allegations of illegal conspiracy for the purposes of resurrecting its § 2 conspiracy to monopolize claim, it is barred by the doctrine of *res judicata*. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 37-41 (1950); *Hurley v. Beech Aircraft Corp.*, 355 F.2d 517, 522 (7th Cir. 1966), *cert. den.*, 385 U.S. 821 (1966) (couched in terms of collateral estoppel); *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 461 F.Supp. 1046, 1051 (N.D. Cal. 1978), *aff'd*, 694 F.2d 1132, 1136 n. 6 (9th Cir. 1982). *See also Reed v. Allen*, 286 U.S. 191, 197-9 (1932); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-401 (1981).

At this point in the proceedings, the questions raised by AMC's petition are of academic interest only. The conspiracy to monopolize claim is dead, a victim of the well-entrenched rules of issue preclusion as well as AMC's lack of evidence. Accordingly, the petition should be denied as moot.

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[2] Although the Ninth Circuit disagreed [A-17 n. 14], it appears from the trial transcript that the district judge intended to grant a directed verdict on AMC's § 2 conspiracy claim in addition to AMC's Clayton Act § 3 tie-in claim and its Sherman Act § 1 conspiracy claim. [*See* RT 3594-5] A § 2 conspiracy instruction was given to the jury [RT 3657-8] but the parties nonetheless acted as if that claim had been eliminated. Thus, AMC's brief on the post-trial motions nowhere mentions the conspiracy to monopolize claim [CR 294] and the district court's order denying the motions ignored it entirely. [App B1-14] Indeed, the opinion states, "On January 7, 1982, . . . AMC's Section 2 claim that Syufy had a monopoly and attempted to monopolize the exhibition of major first-run films in the San Jose zone, were submitted to the jury." [App. B-18] The confusion over the record, standing alone, should cause this Court to deny the petition. *See Kimbrough v. United States*, 364 U.S. 661 (1961); *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960).

II

HEARING THE PETITION ON THE MERITS COULD NOT ALTER THE LOWER COURT'S MANDATE THAT A NEW TRIAL BE HELD AND THIS COURT THEREFORE SHOULD NOT WASTE ITS RESOURCES

AMC argued four theories of § 2 liability to the jury. [App. A-2] In vacating the district court's judgment, the Court of Appeals explained the evidence was inadequate to support the general verdict on two of those four theories, the conspiracy to monopolize theory and the drive-in theatre leveraging theory. [App. A-2, 11-13, 16-19, 23] AMC raises the first of the circuit court's adverse rulings by its petition but not the second (which is now final). Hence the rule of *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962) comes squarely into play in considering whether this Court should grant the petition: where—as here—"one theory of liability upon which the general verdict may have rested" has been erroneously submitted to a jury, "the verdict cannot be upheld" and "it is unnecessary . . . to explore the legality of the other theories."[3]

The petition would have this Court squander its precious time to study AMC's conspiracy to monopolize theory of liability although such efforts could not dispose of this litigation; a new trial is mandated by *Sunkist* without regard to AMC's conspiracy claim because the monopoly leveraging theory of liability was improperly given to the jury. Since the judgment of the Court of Appeals rests comfortably and independently upon a final ruling not challenged in this Court, the petition should be denied. *See The Monrosa v. Carbon Block Export, Inc.*, 359 U.S. 180, 183-4 (1959).

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[3] *See also United N.Y. & N.J. Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613, 619 (1959); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984); *Ely v. Blevins*, 706 F.2d 479, 480 (4th Cir. 1983); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980) *cert. den.* 449 U.S. 982 (1980), all applying the same rule. *Sunkist Growers* and its progeny, which were not even cited to this Court by AMC in connection with the third and fourth questions presented by the petition, plainly reveal the insubstantial nature of those two questions.

III

THE COURT OF APPEALS' DECISION IS CORRECT

A. The Court Of Appeals Applied The Correct Standard Of Proof For Antitrust Conspiracies

The first issue raised by the petition is a false one. AMC suggests the Ninth Circuit created a higher burden of proving conspiracy in a Sherman Act § 2 case than exists for § 1 cases. But the Court of Appeals did no such thing; it followed well-established, virtually identical standards of proving conspiracy under either § 1 or § 2.

In *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946), in a § 2 context, this Court provided its classic description of the quantum of proof necessary to prove conspiracy:

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a *unity or purpose* or a *common design and understanding*, or a *meeting of minds in an unlawful arrangement*, the conclusion that a conspiracy is established is justified." (emphasis added)

The standard of proof is no different in a § 1 vertical conspiracy case as AMC seems to have alleged here [App. A-17]; the plaintiff must prove the parties in the chain of distribution "had a *conscious commitment to a common scheme* designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 769 (1984) (emphasis added). In this case, the Court of Appeals dismissed AMC's § 2 claim that Syufy conspired with the film companies to monopolize the San Jose market because there was no evidence "that any of the distributors shared with Syufy a *common purpose* in monopolizing the hardtop theatre market in the San Jose area." [App. A-18] The lower court's holding plainly comports with *American Tobacco* and *Monsanto* and it need not be reviewed by this Court.[4]

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[4] Obviously, consideration of the type of evidence needed to prove a conspiracy to monopolize is closely linked to the question of the alleged conspirators' intent. If the film distributors neither share an exhibitor's monopolistic intent nor even know of it, both the "conspiracy element"

Contrary to what AMC would lead this Court to believe, the Ninth Circuit considered the "knowledge and acquiescence" test for § 1 conspiracy cases intimated by *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) but the Court of Appeals refused to create a lesser burden for proving conspiracy in § 2 cases by eliminating the need for proof of the alleged coconspirators' knowledge or awareness of the illegal scheme. [App. A-18] *Cf. Albrecht v. The Herald Co.*, 390 U.S. 145, 149 (1968) (§ 1 "combination" found where agent aware of illegal plan and materially aids it); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1072-4 (3d Cir. 1978). The Ninth Circuit's ruling was plainly correct. As this Court's recent decision in *Monsanto* made clear, some unity of purpose is essential to an antitrust conspiracy. 465 U.S. at 764, 768. Since AMC adduced no evidence that either the "distributors shared with Syufy a common purpose" or that the distributors even knew of Syufy's aim [App. A-18], the § 2 conspiracy to monopolize claim (like the § 1 conspiracy claim before it) was properly dismissed.

B. The Court Of Appeals Correctly Required Proof Of Some Coconspirators' Specific Intent To Monopolize

In *American Tobacco*, 328 U.S. at 809, this Court indicated that a Sherman Act § 2 conspiracy to monopolize claim requires proof of the conspirators' intent "to exclude actual or potential competition from the field." *See also United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545, 567 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961) (conspiracy to monopolize requires a finding of specific intent by the persons involved). The lower federal courts have unanimously followed this Court's lead and it is now well-settled that an essential element of the § 2 conspiracy offense is proof of defendants' specific intent to monopolize the market.[5]

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and "specific intent element" of the conspiracy to monopolize cause of action are absent. *See* Section III B, below.

[5] *See, e.g., Great Escape, Inc. v. Union City Body Co. Inc.*, 791 F.2d 532, 540-2 (7th Cir. 1986); *J.T. Gibbons v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir. 1983); *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 438 (10th Cir. 1983) *cert. den.* 464 U.S. 866 (1983);

The lower court's decision fully comports with these precedents. Recognizing there was no evidence that any film distributor "shared with Syufy a common purpose in monopolizing the hardtop theatre market in the San Jose area" or even that any distributor had any reason to know "that Syufy would use the film licenses for monopolistic purposes," the Court of Appeals held the requisite proof of the alleged coconspirators' specific intent to monopolize was lacking. [App. A-18] Although AMC does not dispute the Ninth Circuit's description of the record, AMC contends such proof of the film companies' intent is unnecessary to its conspiracy to monopolize claim; AMC argues Syufy's intent alone should suffice.

AMC's petition improperly jumbles together the three Sherman Act § 2 offenses of monopolization, attempt to monopolize and conspiracy to monopolize. Monopolization claims do not require proof of defendant's specific intent. *American Tobacco*, 328 U.S. at 814; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953). Section 2 attempt claims require proof of one firm's specific intent to monopolize a market. *Times-Picayune*, 345 U.S. at 626. Conspiracy to monopolize claims require proof of two or more conspirators' specific intent to monopolize. *American Tobacco*, 328 U.S. at 809; *Richter Concrete*, 691 F.2d at 827. If § 2 conspiracies did not demand proof of more than one actor's specific intent to monopolize, as the Court of Appeals required, the conspiracy to monopolize offense would be redundant of the offense of attempted monopolization and easier to prove than conspiracies to restrain trade. *See Monsanto*,

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Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 827 (6th Cir. 1982); *Hospital Building Co. v. Trustees of Rex Hospital*, 691 F.2d 678, 690 (4th Cir. 1982) *cert. den.* 464 U.S. 980 (1983); *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir. 1982); *Carpet Seaming Tape Licensing Corp. v. Best Seam, Inc.*, 616 F.2d 1133, 1141 (9th Cir. 1980) *cert. den.* 464 U.S. 818 (1983); *Hill Aircraft and Leasing Corp. v. Fulton County*, 561 F.Supp. 667, 677 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984); *V&L Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651-2 (E.D. Pa. 1975), *aff'd*, 565 F.2d 154 (3d Cir. 1977). *See also* L. Sullivan *Antitrust* at 132.

465 U.S. at 764; P. Areeda and D. Turner III *Antitrust Law* at 358-9.[6]

If Syufy alone had the specific intent to monopolize the San Jose market, then AMC may pursue its attempt to monopolize claim at trial on remand and, if that attempt was successful, then AMC may press its monopolization claim. But without proof that the distributors conspired with Syufy and that those distributors shared Syufy's specific intent to monopolize the market, AMC's § 2 conspiracy claim was properly dismissed.

CONCLUSION

For all of the reasons stated, Syufy respectfully submits this Court should deny AMC's petition for certiorari.

DATED: December 15, 1986.

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[6] Many of the passages from *Paramount* and *Griffith* quoted or cited by AMC relate to monopolization claims and, therefore, are not on point. None of them state that a claim for conspiracy to monopolize may be established without proof of the conspirators' specific intent. Mere proof of a series of exclusive film licenses in San Jose could not supply the missing element of that cause of action. *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F.Supp. 667, 677 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 149-50, 153-4 (3d Cir. 1981) *cert. den.* 455 U.S. 1019 (1982).

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No. 86-789

In The
Supreme Court of the United States

October Term, 1986

American Multi-Cinema, Inc.,
Petitioner,
v.
Syufy Enterprises,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

Petitioner's Reply Memorandum

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Syufy's counterstatement of the case attempts to create a factual conflict by relying upon evidence that was rejected by the jury. AMC was the prevailing party at trial. All reasonable inferences from the evidence must be construed in favor of AMC. Syufy's tactic of picking and choosing among isolated facts and judicial comments is unpersuasive.

A substantial portion of the counterstatement is devoted to a discussion of Syufy's interpretation of its claim against AMC. Syufy's belief regarding the strength of its evidence is of no moment and cannot create a factual conflict. Both the

judge and the jury rejected Syufy's contentions. [1] The trial judge, in affirming the verdict and denying Syufy's motion for judgment not withstanding the verdict or new trial, found that there was "substantial evidence" to support AMC's counterclaim and that Syufy's proof was "unconvincing" [Appendix B-14]. [2]

I

AMC'S CONSPIRACY TO MONOPOLIZE CLAIM IS NOT BARRED OR MOOT

Syufy employs convoluted logic to argue that the district court's grant of a motion for directed verdict on AMC's Section 1 claim against Syufy operates as *res judicata* to preclude AMC's Section 2 conspiracy to monopolize claim. This argument ignores the principle that inconsistent verdicts between a Section 1 conspiracy in restraint of trade and a Section 2 conspiracy to monopolize are not grounds for an appellate court to overturn a verdict. *See United States v. National City Lines*, 186 F.2d 562, 569 (7th Cir. 1951).

II

GRANTING AMC'S PETITION FOR WRIT OF CERTIORARI WOULD CHANGE THE RESULT BASED UPON THE NINTH CIRCUIT'S AMENDED DECISION

The Ninth Circuit initially stated that AMC was required to prevail on each of four "claims" submitted to a jury in or-

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[1] Even if there was some merit to Syufy's claim of anti-competitive conduct by AMC, such conduct would not bar AMC's recovery. *See Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951).

[2] Syufy devotes a large portion of its counterstatement to a discussion of a proposed motion picture exhibitor cooperative. Syufy does not, however, disclose that the cooperative was thoroughly reviewed by AMC with (1) the Department of Justice, Antitrust Division, (2) nearly all distributors and exhibitors and (3) was never implemented or operational [RT 1628, 1655-6, 1671-2, 1685-6, 1857, 1859, 1972, 2095, 2429]. The jury, the district court judge and the Ninth Circuit found that the proposed cooperative did not violate the antitrust laws.

der to sustain the judgment. 783 F.2d at 891. The Ninth Circuit amended its decision to hold that although AMC presented four "theories" of liability, AMC's judgment was based on three claims for relief: monopolization, attempted monopolization and a conspiracy to monopolize. Two of the "theories" related to the monopolization claim. [3] The Ninth Circuit held that the evidence was sufficient to sustain AMC's monopolization claim [Appendix A-3-10]. The Ninth Circuit also held that there was substantial evidence to uphold AMC's attempted monopolization claim [Appendix A-14-16]. The judgment in favor of AMC on its conspiracy to monopolize claim was vacated because the Ninth Circuit apparently concluded AMC failed to prove co-conspirator participation in the conspiracy or co-conspirator specific intent. If this court grants AMC's petition for writ of certiorari and reverses the Ninth Circuit's erroneous analysis of a conspiracy to monopolize claim, the litigation will conclude with a final judgment being entered in favor of AMC.

III

THE NINTH CIRCUIT INCORRECTLY APPLIED THE STANDARD OF PROOF FOR ANTITRUST CONSPIRACIES

Syufy contends that the Ninth Circuit applied the same standard to prove a Section 1 and 2 conspiracy. If the Ninth Circuit had applied this standard, judgment would have been entered in favor of AMC. Syufy entered into contractual arrangements with distributors which granted Syufy unreasonable and excessive clearance [Appendix A-10]. This unlawful agreement between Syufy and the co-conspirators (the distributors) established a conspiracy in violation of

[3] If either of these two factual theories were sufficient to support the verdict, judgment on the monopolization claim must be entered in favor of AMC. *See Baumler v. State Farm Mutual Automobile Insurance Co.*, 493 F.2d 130, 134 (9th Cir. 1974) ("The jury is presumed to have acted correctly; thus where there are two alternative factual theories which might support the verdict, the verdict will be upheld if there is sufficient evidence to support either theory.")

Section 1. Unless analysis under Section 2 differs, AMC proved a Section 2 conspiracy. This court has held that evidence virtually identical to that presented by AMC establishes a Section 2 conspiracy. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) this court stated "each discriminatory contract constituted a conspiracy between licensor and licensee." *Id.* at 160. The same standard was reiterated in *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948) wherein this court held that the motion picture distributors' execution of film license agreements "brought the distributors into unlawful combinations with the Schine defendants." *Id.* at 116. AMC satisfied its burden to prove a Section 2 conspiracy by proving that the distributors signed film license agreements with Syufy. The Ninth Circuit ignored *Paramount* and *Schine* and created an additional element to prove a conspiracy to monopolize. This court should grant AMC's petition for writ of certiorari to resolve the Ninth Circuit's erroneous creation of a conflict in the standard of proof between a Section 1 and Section 2 conspiracy.

IV
PROOF OF SPECIFIC INTENT IS NOT NECESSARY

Syufy claims that specific intent is necessary to prove a conspiracy to monopolize. [4] For this proposition, Syufy relies upon *American Tobacco Company v. United States*, 328 U.S. 781 (1946). The holding in *American Tobacco* is exactly contrary to Syufy's argument. This court held that no specific intent was required if the co-conspirators possessed monopoly power. "To read the passage as demanding any 'specific'

[4] The argument rings hollow in light of the position advanced by Syufy's counsel in a recent American Bar Association Publication. *See* Crew, *Matsushita v. Zenith: The Chicago School Teaches the Supreme Court a Dubious Lesson*, 1 Antitrust 11, 15 (1986) (To prove a Section 2 conspiracy, "[i]t does not matter that defendants and their accomplices harbored different motives or were in different markets.") Specific intent is not an element of a Section 2 conspiracy.

intent, makes nonsense of it ..." *Id.* at 814. Similarly, in *United States v. Griffith*, 334 U.S. 100 (1948) the court held that specific intent is necessary only where the "acts fall short of the results condemned by the Act." *Id.* at 105. The results condemned by the Act were present — Syufy achieved monopoly power [Appendix A-8-9].

Syufy's argument does not address the facts that were proven in this case. Syufy possessed monopoly power. If one of the conspirators possesses monopoly power, proof of specific intent is not required.[5] *See Paramount* at 172-3.

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[5] One commentator has analyzed the different elements in proving a conspiracy to monopolize depending upon whether the conspirators possess monopoly. The commentator concluded that based upon *Griffith* and *American Tobacco* proof of specific intent in a conspiracy to monopolize case is unnecessary when the co-conspirators possess monopoly power. *See* Holmes, *Conspiracies to Monopolize: A Decisional Model*, 42 Ohio St.L.Rev. 731, 747-8 (1981).

CONCLUSION

For each of the reasons stated, this court should grant AMC's petition for writ of certiorari.

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